

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

POLK COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 19-4256TTS

JEAN REGAN,

Respondent.

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RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Andrew D. Manko of the Division of Administrative Hearings (“DOAH”), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019),<sup>1</sup> on December 9, 2019, in Bartow, Florida.

APPEARANCES

For Petitioner: Donald H. Wilson, Jr., Esquire  
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For Respondent: Branden M. Vicari, Esquire  
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<sup>1</sup> All statutory references are to Florida Statutes (2019), unless otherwise noted.

STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner, Polk County School Board, to terminate Respondent, Jean Regan, from her employment as a teacher.

PRELIMINARY STATEMENT

By letter, dated June 5, 2019, the Associate Superintendent of the Polk County School Board (the “School Board”) notified Ms. Regan of her intent to recommend that Ms. Regan be terminated from her employment as a classroom teacher for improperly assisting Exceptional Student Education (“ESE”) students during the Florida Standards Assessments Test (“FSAT”). The School Board maintained that this conduct constituted “just cause” to terminate Ms. Regan in accordance with Step Four of the School Board’s Progressive Discipline Policy.

Ms. Regan timely requested an administrative hearing and the School Board referred the matter to DOAH for assignment of an Administrative Law Judge to conduct an evidentiary hearing under chapter 120, Florida Statutes.

The undersigned initially set the final hearing for October 14, 2019. After granting the parties’ joint request for a continuance, the undersigned held the final hearing on December 9, 2019.

The School Board presented the testimony of four witnesses: (1) Kimberly Sealey, the Principal at North Lakeland Elementary (the “School”); (2) Heather Himes, the School Board’s District Assessment Coordinator; (3) Jennifer Wiedenman, the School’s Assistant Principal; and (4) Deblyn Smith, an Inclusion Teacher at the School, who served as a proctor during the FSAT. Petitioner’s Exhibits 2 through 18 were received into evidence over Respondent’s hearsay objections to Petitioner’s Exhibits 13 and 16 through 18. Petitioner withdrew its Proposed Exhibit 1.

Ms. Regan testified on her own behalf and also presented the testimony of Carolyn Braudrick, a retired ESE teacher who worked for the School Board for 21 years, including four years at the School.

A one-volume Transcript of the final hearing was filed at DOAH on January 9, 2020. After receiving one 30-day extension, the parties timely filed their Proposed Recommended Orders (“PROs”), which were duly considered in preparing this Recommended Order.

### FINDINGS OF FACT

#### I. THE PARTIES AND TERMS OF EMPLOYMENT

1. Ms. Regan has been employed by the School Board as a classroom teacher for about 15 years. Her employment is subject to a professional services contract pursuant to section 1012.33, Florida Statutes.

2. Ms. Regan has taught at the School since 2014. During the 2017-2018 school year, she served as an ESE inclusion teacher in the fourth grade. She continued in that role for the same ESE students in fifth grade the following school year.

3. At all relevant times, the Teacher Collective Bargaining Agreement (“CBA”)—a contract between the School Board and the Polk Education Association, Inc.—governed the terms of Ms. Regan’s employment. The CBA provides that teachers cannot be disciplined or terminated “without just cause,” which is defined as a “fair and reasonable basis for disciplinary action up to and including termination, as defined in applicable Florida Statutes specific to the contract under which the employee is employed.”

4. The CBA also provides for progressive discipline administered as follows: (1) verbal warning; (2) written reprimand; (3) suspension without pay for up to five days; and (4) termination. Importantly, the CBA makes clear that “[p]rogressive discipline shall be followed, except in cases where the course of conduct or the severity of the offense justifies otherwise.”

## II. ADMINISTRATIVE CHARGES

5. On May 17, 2019, the Principal sent a letter to the Superintendent alleging that Ms. Regan engaged in unethical and unlawful conduct by interfering with the student achievement results during the English Language Arts (“ELA Reading”) FSAT and failing to maintain honesty in her professional dealings by submitting a written statement inconsistent with the video recording. The Principal argued that this severe misconduct constituted just cause for her termination.

6. In its termination letter, the School Board alleged that Ms. Regan violated Florida Administrative Code Rule 6B-1.006(5)(a)<sup>2</sup> by: (1) improperly looking through several FSAT booklets to determine if all questions had been answered and/or answered correctly; (2) giving verbal or non-verbal cues to assist students with answering the questions correctly; and (3) submitting a written statement that was inconsistent with the video of the FSAT. The School Board stated that it lost confidence in her ability to be a trustworthy and productive member of the School and that just cause existed to terminate her employment.

7. It is undisputed that the School Board did not administer progressive discipline against Ms. Regan. Instead, it contends that just cause exists to move directly to termination based on the severity of the alleged misconduct.

## III. FSAT REQUIREMENTS AND TRAINING

8. The School Board’s District Assessment Coordinator, Ms. Himes, trained test coordinators at each school on the FSAT requirements, who in turn trained the test administrators and proctors at their respective schools.

9. The Assistant Principal, Ms. Weidenman, served as the School’s test coordinator. She conducted an FSAT training session, which Ms. Regan, as a test administrator, and Ms. Smith, as a proctor, both attended.

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<sup>2</sup> The Principal and School Board both incorrectly cited to rule 6B-1.006(5)(a) in the charge documents. However, that rule was transferred to Florida Administrative Code Rule 6A-10.081 several years ago. The School Board cited the correct version of the rule in its PRO.

10. During the session, the Assistant Principal provided the attendees with the FSAT training manual containing general testing requirements and discussed the highlights therein. She noted that the attendees needed to review the manual themselves, complete an online moodle training course, and pass a quiz at its completion. Importantly, the training session, manual, and online course covered general guidelines for administering the FSAT to students who did not need accommodations.

11. Prior to the FSAT, administrators signed two agreements concerning security and prohibited activities. These agreements specified standards for testing students in general. For students entitled to receive accommodations, like the 19 ESE students here, numerous exceptions could apply.

12. For instance, the security agreement permitted administrators “to provide the accommodation(s) as described in each test administration manual.” However, it offered no further elucidation.

13. The prohibited activities agreement expressly prohibited administrators from assisting students in answering test items, giving verbal cues (directing the student to recheck answers) or non-verbal cues (pointing to specific items in the test), opening or checking through the test booklets *before the test*, or reading through student test documents *after the test*. Importantly, however, the agreement allowed administrators to read test items while monitoring the room to provide allowable accommodations.<sup>3</sup> The agreement also did not expressly prohibit administrators from touching the test booklets or tracing their fingers along the page while providing an oral accommodation *during the test*.

14. Notwithstanding the multitude of possible exceptions (both expressed in the agreement and otherwise) that could apply, the School did not offer a special training session to the administrators and proctors who would be providing accommodations during the FSAT. Instead, the Assistant Principal

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<sup>3</sup> Although the agreement notes that the allowable accommodations are “described in Appendix A,” the appendix is not attached to the copy of the exhibit in evidence.

referred them to the FSAT Accommodations Guide (the “Guide”) available online and required them to review it on their own.

15. The Guide offered a substantial amount of information on numerous types of accommodations. It also recognized that other accommodations may be given based on the students’ needs and individual education plans (“IEPs”), as long as they did not unfairly advantage the students or interfere with the validity of the test. The Guide noted that the accommodations “must be the same or nearly the same as those needed and used by the student in completing classroom instruction and assessment activities.”

16. The Guide permitted oral presentation or read-aloud accommodations. During the writing portion of the FSAT, the prompts, items, and answer choices may be read aloud to the student as many times as requested. Test directions may be repeated, clarified, or summarized as many times as requested and students could verbally demonstrate that they understand the directions. While providing such accommodations, administrators must not use inflection that might lead a student to the correct/incorrect responses. The Guide did not expressly prohibit administrators from touching the test booklet or tracing their finger along the page while providing oral presentation accommodations.

17. Verbal encouragement, such as “keep working” or “make sure to answer every question,” could be provided so long as it was not used to assist a student in producing or correcting responses. For non-native English speakers (“ELLs”), the Guide permits access to an English-to-heritage language translation dictionary.<sup>4</sup>

18. The School Board’s testing coordinator, Ms. Himes, testified at length about the FSAT requirements. She testified that the FSAT standards

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<sup>4</sup> The School Board elicited testimony that Ms. Regan improperly used her cell phone during the FSAT. However, Ms. Regan confirmed that she used the phone only to text the Assistant Principal to bring a dictionary for an ELL student who needed a word translated into Spanish, consistent with her IEP. The School Board never referred this issue in its charge letter or in its PRO.

prohibit administrators from helping a student identify a correct answer, touching a test booklet, opening and going through a test booklet without a prompt from the student, or directing a student to an issue in the test, *e.g.*, a stray mark or unanswered question, without a prompt from the student.

19. Importantly, however, Ms. Himes conceded that the FSAT standards are fluid when it comes to ESE students needing accommodations and that the Guide failed to articulate all of the exceptions that could apply. She agreed that the FSAT materials did not expressly prohibit touching the test booklets, tracing a finger along them, or flipping or otherwise looking through them when providing oral accommodations. She confirmed that, if students were taught in the classroom to mark their test booklets as a prompt for the teacher to look through and identify issues on which they need an accommodation, then that accommodation should be permitted during the FSAT. She also acknowledged that administrators could encourage students to fill in all bubbles fully, erase stray marks, or complete all questions if they saw an issue in a student's test booklet, so long as they did not direct the students to particular questions.

#### IV. THE FSAT AND RESULTING INVESTIGATION

20. Prior to the FSAT, the School assigned Ms. Regan to serve as the test administrator and Ms. Smith to serve as the proctor in a room with 19 ESE fifth-grade students. Ms. Regan had previously provided accommodations during the FSAT, but Ms. Smith had never done so.

21. The IEPs for every student allowed them to receive multiple accommodations, some of which overlapped while others applied only to one or two students. For instance, all of the students could receive oral presentation, including the directions, test questions, and answers read to them as many times as they needed, and verbal encouragement. Almost all of them could have the directions repeated, summarized, or clarified, and a majority could paraphrase and repeat the directions back. Several needed the

directions given in small, distinct steps, and two could even read the passages, questions, and answers aloud to themselves.

22. Ms. Regan served as the ESE inclusion teacher for these students for close to two years. Ms. Regan confirmed that many of them had a learning disability, Attention Deficit Hyperactivity Disorder (“ADHD”), and/or a language impairment issue. Because they had difficulty processing information and staying focused, they needed to receive the materials in different ways and to develop strategies for understanding what was being asked of them.

23. Ms. Regan spent considerable time working with them. She tried to determine the best way for each of them to receive information and drafted their IEPs accordingly. She helped them with reading, writing, and math throughout the week. She knew them and their individual accommodations; they, in turn, felt comfortable with her.

24. Ms. Regan helped them develop test-taking strategies. She taught them to mark the margin if they had a question so they could move on while awaiting her assistance. Many of these students had trouble maintaining their focus, so they closed their books to take a break. They often asked her to check to see if they were finished. The marks in the margin helped them remember if they had specific questions and prompted Ms. Regan to find the questions on which they needed an accommodation. The Assistant Principal confirmed that the School left the decision as to whether teachers would prompt the students on the issue of accommodations up to the teacher.

25. Ms. Regan also gave them reading tests almost every Friday. She provided them with accommodations to simulate the FSAT environment. During the practice tests, Ms. Regan read the directions, gave the students time to read the passage, and then read the questions and answers to the entire class at once. Thereafter, she could provide individual accommodations if they raised their hands or marked their test booklets.



26. In advance of the FSAT, Ms. Regan spoke to the Assistant Principal about concerns she had about testing all 19 ESE students in the same room. Several students required accommodations that were inconsistent with being tested in a big group. Three students could read the passages and questions aloud to themselves, and one student had behavioral issues. She requested that the School test these students separately or at a later time. The Assistant Principal denied the request due to space and personnel issues.

27. Ms. Regan also requested that the School Board provide the same version of the FSAT so that she could provide the oral presentation accommodations to the entire group, just like the practice tests. The ELA Reading FSAT also contained many more sets of directions than the practice tests, including at the beginning, before each reading passage, and sometimes before certain questions. That fact made it all the more critical to use the same version to make it easier to accommodate the students, all of whom would need the directions and questions read to them multiple times.

28. On the morning of the test, Ms. Regan picked up the FSAT materials. She learned at that point that the School Board could not provide the same version of the FSAT. As a result, she and Ms. Smith would be required to provide oral presentation accommodations to the students individually. She reiterated her concerns about testing the three students in the same room to the Assistant Principal, headed to the media center, and created a seating chart in an effort to minimize disruptions.

29. All of the students required oral accommodations. The majority requested that Ms. Regan read the directions and multiple questions and answers, sometimes several times. She repeated, summarized, or clarified directions to students who requested that accommodation multiple times. She permitted students, mostly those with language impairments, to paraphrase and repeat the directions back to her as allowed by their IEPs.

30. In providing these accommodations, Ms. Regan flipped through the test booklets at times when prompted by the student. Sometimes she picked

up a test booklet and traced her finger along the page as she read. She pointed at the booklet when necessary to get confirmation from the student as to the particular question needing an accommodation. She also flipped through the booklets when the directions, questions, and answers appeared on multiple pages. She also looked through test booklets for marks made by the students that identified the issues on which they needed an accommodation, just as she taught them in class.

31. When students acted out, stopped working before completing the test, or otherwise asked her to assist them beyond their allowed accommodations, she encouraged them to do their best and reiterated the importance of finishing. When one student froze up and stopped working without answering most of the questions, she sat next to him to encourage him to continue working and to offer accommodations when requested. One student asked Ms. Regan for the correct answer and acted out when she refused to give it to him, so she encouraged him to do his best.

32. Given the multiple requests to re-read items and the amount of time it took Ms. Regan to get back to the student while providing accommodations to others, each interaction could take an extended period of time. That is not surprising in a room with 19 ESE students and only two teachers.

33. Ms. Regan credibly confirmed that she never assisted a student with determining correct or incorrect answers. Indeed, she never read the reading passages to know the correct answers. Although students watched her face when she read test items to try to glean the correct answer, she did not make any faces or otherwise hint at the answers. She also never directed a student to erase a specific item, though she may have read that portion of the directions reminding the students to erase all stray marks.

34. Prior to finishing the test, several students asked Ms. Regan if they were ready to turn in their tests. She looked through the booklets and repeated the directions about completely filling in bubbles and erasing stray marks. After the students reviewed their tests again, several asked her to re-

read the directions or some questions. She accommodated them as she had throughout the test until the last student finished.

35. Ms. Smith also checked test booklets during the FSAT and told a few students to make sure their answers were completely marked.

36. After the FSAT, the Assistant Principal received a report that Ms. Regan looked through test booklets to determine if students answered questions correctly. She initially spoke with Ms. Regan, who admitted to checking to make sure answer bubbles were darkened.<sup>5</sup>

37. The Assistant Principal spoke to two students and Ms. Smith. Although Ms. Smith initially failed to disclose that she had directed students to darken their bubbles, she admitted to doing so in a subsequent phone call. Ms. Smith informed the Assistant Principal that she became concerned during the FSAT because the students seemed to favor assistance from Ms. Regan, and Ms. Regan seemed to spend too much time with each student. However, Ms. Smith acknowledged that she lacked experience in providing accommodations during the FSAT, she could not hear the discussions, and she only made this report after the Assistant Principal approached her.

38. Ms. Regan provided a written statement. She confirmed that she provided oral presentation accommodations and encouraged the students to do their best and keep working. Several students asked her if they were finished with the FSAT, so she repeated the directions to them about completely filling in bubbles and being sure to erase completely. After the

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<sup>5</sup> Most of the evidence about the Assistant Principal's investigation into what students and other teachers told her constitutes hearsay and, in many instances, hearsay within hearsay, for which no exception has been established. This includes Petitioner's Exhibits 4 (an email sent by Ms. Smith to the Assistant Principal), 13 (questionnaires drafted by the Assistant Principal summarizing what students purportedly told her), 16 (the Principal's investigation notes), 17 (the Assistant Principal's investigation notes), and 18 (a text message from a teacher to the Assistant Principal about what a student told her). The undersigned has not considered these five exhibits or hearsay testimony from the Assistant Principal or Ms. Smith as to what others purportedly told them, unless it merely supplemented or explained other non-hearsay testimony, or met an exception to the hearsay rule. One such example is testimony as to what Ms. Regan told the Assistant Principal and Ms. Regan's written statement, which are admissions under section 90.803(18), Florida Statutes.

students had reviewed their test booklets, several asked her to either reread the directions or some of the questions. She did so consistent with their IEPs

39. The Assistant Principal interviewed all of the students and drafted questionnaires summarizing what they purportedly told her. The investigation also included a review of the video taken during the FSAT.

40. After receiving the materials from the Assistant Principal, Ms. Himes forwarded them along with a report to the Florida Department of Education (“Department”). The Department also requested a statement from Ms. Smith.

41. Ultimately, the Department invalidated the ELA reading FSAT for all 19 ESE students. Although the School tries to evaluate individual student improvement from year to year, the evidence is clear that most ESE students do not pass the FSAT. As such, the invalidation of the tests likely had no affect on the School’s overall grade.

42. Based on its investigation and the invalidation of the tests, the School Board sought to terminate Ms. Regan for violating the FSAT standards. The School Board took no disciplinary action against Ms. Smith, despite her concession that she too had engaged in similar conduct during the FSAT.

43. To support its allegations against Ms. Regan, the School Board relied on the video taken during the FSAT, the Assistant Principal’s questionnaires, and the depositions of ten of the ESE students. However, this evidence fails to credibly show that Ms. Regan violated FSAT standards.

44. The video evinces a room in need of near constant assistance. Most of the students raised their hands with questions, sometimes numerous times; many had difficulty staying focused throughout the test. Ms. Regan consistently moved around the room addressing students who raised their hands or were either not focusing or acting out. At times, Ms. Regan placed her finger on the test booklets and moved it along the page, as if to point the students’ attention to the words she was reading. At other times, she assisted the students by flipping through their booklets after they requested assistance. As the testimony confirmed, the FSAT standards did not prohibit

such conduct as long as it mirrored accommodations given in the classroom and did not assist the students in determining the correct answers.

45. The video also shows Ms. Regan spending more time with the students than Ms. Smith. Contrary to the School Board's contention that this fact supports a finding that Ms. Regan improperly assisted the students, the greater weight of the credible evidence established otherwise. It is not surprising that the students preferred assistance from Ms. Regan because she served as their ESE inclusion teacher for two years and accommodated them during their practice tests. It is equally not surprising that Ms. Regan had to stay with each student for an extended period. Many of them asked her to read the directions, questions, and answers, sometimes several times each. Others requested that she summarize or clarify the directions, the students could paraphrase the directions, and Ms. Regan could re-read them again.

46. Moreover, the frequency and duration of the visits was more likely due to FSAT administration decisions outside Ms. Regan's control. For one, the School decided to test all 19 ESE students in one room with only two teachers to assist. While that decision may have been necessitated by personnel and space issues, the sheer number of ESE students made it difficult for two people to timely provide accommodations. Many students waited for extended periods of time while Ms. Regan and Ms. Smith assisted others, which likely resulted in longer individual exchanges. Exacerbating the problem, the School Board (directed by the Department) denied Ms. Regan's request to use the same version of the FSAT; that would have allowed her to provide accommodations to the entire group at one time, consistent with the practice tests, and hopefully minimize the number of individual requests.

47. The undersigned also rejects the contention that Ms. Regan's improper assistance is evident because students appeared to complete or change answers after interacting with her. The students requested accommodations from Ms. Regan specifically to assist them in understanding the directions,

questions, and answers. It makes perfect sense that they would complete or possibly change an answer after receiving a permissible accommodation.

48. Because the video lacks audio, it is impossible to decipher what Ms. Regan is saying to the students during these brief interactions. However, she credibly explained that she never assisted them with ascertaining the correct answers and merely provided them with the oral accommodations to which they were entitled. Thus, contrary to the testimony of the School Board's witnesses, the undersigned disagrees that the video is credible evidence of any improper conduct in violation of the FSAT standards. It also is consistent with Ms. Regan's written statement.

49. As for the questionnaires and the student depositions, it bears emphasizing at the outset that the record lacks evidence as to the particular exceptionalities attendant to each of these ESE students. Ms. Regan testified that several have learning disabilities and ADHD. Importantly, however, no witnesses articulated the extent of those exceptionalities, much less explained how those exceptionalities may impact their ability to recall the events or tell the truth. Without such information, the undersigned's ability to evaluate the credibility of the students—all of whom testified by deposition—is hampered. This is even more problematic given inconsistencies within the depositions themselves and between the depositions and the questionnaires.

50. Putting aside for a moment the hearsay and double hearsay nature of the questionnaires, the undersigned also cannot ignore that the Assistant Principal never placed the students under oath or asked them to confirm the accuracy of the notes. That renders them inherently unreliable. Their probative value is further undermined given that some of the questionnaires conflicted with the depositions on several critical points.

51. Although the undersigned appreciates that procuring students to testify live can be difficult, the use of depositions in lieu of live testimony is

problematic.<sup>6</sup> For one, it undermines the fact-finder’s ability to meaningfully assess the credibility of the deponents as compared to the witnesses who testify live. This is particularly so where the live witnesses are found to be credible, like Ms. Regan in this case. That problem is compounded here because the deponents are fifth-grade ESE students and the record is devoid of evidence as to how their individual exceptionalities may impact their credibility or the weight to be given to their testimony.

52. Of all of the deponents, G.R. offered the most consistent and clear testimony. He testified definitively that Ms. Regan read half of the questions and answers to him during the test, but she never provided hints or assisted him in finding the correct answers. G.R. did not believe that Ms. Regan improperly assisted any students during the FSAT because the allegation that she had done so was untrue “drama” created by a few students.

53. Three of the deponents, *i.e.*, K.B., A.N.M., and C.D., confirmed that Ms. Regan provided them with oral accommodations by reading the directions, questions, and answers multiple times and helped them find the questions on which they wanted an accommodation by looking for marks they made in the margins. None of them offered definitive testimony that Ms. Regan gave them the correct answers or otherwise directed them to

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<sup>6</sup> The depositions also constitute inadmissible hearsay for which no exception has been established. In a civil action, depositions may be admitted either under Florida Rule of Civil Procedure 1.330(a)(3) or as an exception to the hearsay rule for former testimony under the Florida Evidence Code. *Bank of Montreal v. Estate of Antoine*, 86 So. 3d 1262, 1264 (Fla. 4th DCA 2012). Because the School Board failed to establish that the ten students were “unavailable” to testify live, the depositions are not admissible under rule 1.330(a)(3) or section 90.804(2)(a), Florida Statutes. And, though section 90.803(22) provides that “former testimony” taken in the same case where the party against whom the evidence is offered had a similar motive to develop the evidence is admissible regardless of unavailability, that is an improper ground on which to admit a deposition in an administrative hearing. *Grabau v. Dep’t of Health*, 816 So. 2d 701, 709 (Fla. 1st DCA 2002). The parties’ agreement to use the depositions in lieu of live testimony does not permit the undersigned to base a finding of fact on hearsay alone unless it supplements or explains non-hearsay evidence or otherwise would be admissible *over objection* in a civil action, as clearly proscribed by section 120.57(1)(c). *Accord* Fla. Admin. Code R. 28-106.213(3). Thus, the undersigned has considered the deposition testimony only to the extent that it supplements or explains other non-hearsay evidence.

change their answers and all of them acknowledged inconsistencies between their questionnaires and their testimony.

54. The remaining six deponents, *i.e.*, T.S., J.S., J.R.V., J.R.R., C.B., and A.F., were not sworn in properly by engaging in a colloquy about knowing the difference between the truth and a lie *and* obtaining verbal confirmation that they would testify truthfully. Those facts, in addition to the credibility, and inconsistency issues, renders their testimony unreliable.

55. Lastly, the School Board contends Ms. Regan's motivation to improperly assist her students is evident from a conversation she had with the Principal concerning her placement for the next school year. During the conversation, Ms. Regan asked to remain as the fifth grade ESE inclusion teacher and the Principal confirmed that she would base her decision in part on the FSAT results. However, Ms. Regan credibly and believably testified that she had no such motivation. And, given that the FSAT results apparently are a factor in the School's placement decisions, this argument could apply in all cases involving allegations of improper FSAT assistance.

#### ULTIMATE FINDINGS OF FACT

56. Under Florida law, whether charged conduct constitutes a deviation from a standard of conduct established by statute or rule is a question of fact to be decided by the trier-of-fact, considering the testimony and evidence in the context of the alleged violation. *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985); *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); *Langston v. Jamerson*, 653 So. 2d 489 (Fla. 1st DCA 1995). Thus, deciding whether Ms. Regan's alleged conduct violates the law as charged in the School Board's termination letter is a factual, not legal, determination.

57. Based on the weight of the credible evidence, the School Board failed to establish by a preponderance of the evidence that Ms. Regan acted dishonestly by assisting students in selecting correct answers. Ms. Regan credibly denied ever assisting the students in that manner. In fact, the



credible evidence confirmed that Ms. Regan had little opportunity to read the passages to determine the correct answers and, given that the students had different versions of the FSAT, it was highly improbable that she could have known the correct answers when moving from student to student.

58. Based on the weight of the credible evidence, the School Board failed to establish by a preponderance of the evidence that Ms. Regan acted dishonestly by otherwise violating the FSAT standards. The credible evidence confirmed that Ms. Regan permissibly could: touch the test booklets and point at items while providing oral accommodations; flip through the test booklet to look for the questions the students had identified as needing an accommodation because that is exactly how they practiced in the classroom; and encourage the students to make sure that they completed the test by reading the corresponding directions, particularly after they prompted her to do so, just as they learned in class.

#### CONCLUSIONS OF LAW

59. DOAH has jurisdiction over the parties and subject matter of this cause. §§ 120.569, 120.57(1), and 760.35(3), Fla. Stat.

60. The School Board is duly constituted and charged with the duty to operate, control, and supervise public schools within Polk County, Florida. Art. IX, § 4(b), Fla. Const.; §§ 1001.33 and 1001.42, Fla. Stat. This includes the power to discipline instructional staff, such as classroom teachers. §§ 1012.22(1)(f) and 1012.33, Fla. Stat.

61. Ms. Regan is a classroom teacher and her employment with the School Board is governed by a professional service contract. §§ 1012.01(2)(a) and 1012.33, Fla. Stat. The terms of Ms. Regan's employment with the School Board are also governed by the CBA.

62. "The School Board bears the burden of proving by a preponderance of the evidence each element of the charged offense which may warrant dismissal." *Cropsey v. Sch. Bd. of Manatee Cty.*, 19 So. 3d 351, 355 (Fla. 2d

DCA 2009) (citing *Dileo v. Sch. Bd. of Dade Cty.*, 569 So. 2d 883 (Fla. 3d DCA 1990)). A preponderance is defined as “the greater weight of the evidence,” or evidence that “more likely than not” tends to prove a certain proposition. *S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 872 (Fla. 2014).

63. To terminate Ms. Regan’s employment, the School Board must prove that she committed the acts alleged; that those acts violate the laws, rules, and policies at issue; and that violation of those statutes, rules, and policies constitutes just cause for her dismissal. § 1012.33(1)(a) and (6), Fla. Stat.

64. Similarly, article 4.4 of the CBA provides that teachers cannot be disciplined or terminated “without just cause.” The CBA defines just cause as a “fair and reasonable basis for disciplinary action up to and including termination, as defined in applicable Florida Statutes specific to the contract under which the employee is employed.”

65. In its PRO, the School Board contended that it has just cause to terminate Ms. Regan for engaging in “misconduct in office” that impaired her effectiveness as an educator. Fla. Admin. Code R. 6A-5.056(2). Specifically, the School Board argued that Ms. Regan failed to maintain honesty in her professional dealings when she “surreptitiously assisted students in the selection of correct answers and by otherwise violating testing rules and regulations,” contrary to Florida Administrative Code Rule 6A-10.081(2)(c)1.

66. Section 1012.33(1)(a) lists the instances that qualify as “just cause,” including “misconduct in office.”

67. “Misconduct in office” includes any of the following:

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

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;

- (c) A violation of the adopted school board rules;
- (d) Behavior that disrupts the student's learning environment; or
- (e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

Fla. Admin. Code R. 6A-5.056.

68. One of the Principles of Professional Conduct is an obligation for teachers to “maintain honesty in all professional dealings.” Fla. Admin. Code R. 6A-10.081(2)(c).

69. Based on the Findings of Fact and Ultimate Findings of Fact, the School Board failed to prove by a preponderance of the evidence that Ms. Regan acted dishonestly by assisting students in selecting the correct answers. To the contrary, the credible weight of the evidence established that Ms. Regan never improperly assisted the students in this regard.

70. Based on the Findings of Fact and Ultimate Findings of Fact, the School Board failed to prove by a preponderance of the evidence that Ms. Regan acted dishonestly by violating any other FSAT standards. To the contrary, the credible weight of the evidence showed that she accommodated the students in accordance with their IEPs and never acted in contravention to the FSAT standards. Ms. Regan simply applied the same accommodations used in the classroom, consistent with the Guide and the law. *See* Fla. Admin. Code R. 6A-1.0943(a) (requiring school boards to “utilize appropriate and allowable accommodations for [the FSAT] within the limits prescribed herein and current statewide standardized assessment test administration manuals,” which are “based on current instructional accommodations and accessible instructional materials used by the student in the classroom”).

71. Thus, the School Board lacked “just cause” to terminate Ms. Regan. Because the School Board improperly suspended Ms. Regan without pay on

June 5, 2019, it should immediately reinstate her as a classroom teacher and provide her with back pay from that date forward.

72. Although the undersigned concludes that the School Board failed to establish “just cause,” the School Board’s request to terminate would have been an inappropriate penalty even had it proved the alleged violations.

73. The CBA required the School Board to apply progressive discipline “except in cases where the course of conduct or the severity of the offense justifies otherwise.”

74. It is undisputed that the School Board failed to follow progressive discipline in this case. Thus, its discretion to impose the ultimate sanction of termination is limited to situations where the course of conduct or the severity of the offense justifies otherwise. Making that determination is a question of ultimate fact for the undersigned to determine based on the competent, substantial record evidence. *See Costin v. Fla. A & M Univ. Bd. of Trs.*, 972 So. 2d 1084, 1086-87 (Fla. 5th DCA 2008) (holding that the ALJ’s finding as to whether employee’s misconduct justified dismissal based on terms of the university’s progressive discipline rule was “an ‘ultimate fact’ best left to the trier of fact under these circumstances”).

75. The CBA does not define what “course of conduct” or “offense” is severe enough to meet the exception to progressive discipline and the School Board presented no evidence on this issue. Given that this is an exception, it must mean something more egregious than the standard types of misconduct defined in rule 6A-5.056, for which progressive discipline must be followed.

76. Moreover, the CBA’s definition of “just cause” requires that there be a “fair and reasonable basis for disciplinary action” based on the severity of the offense, particularly given the requirement for progressive discipline. *See Bell v. School Bd. of Dade Cty.*, 681 So. 2d 843, 844-45 (Fla. 3d DCA 1996) (remanding for issuance of lesser sanction given failure to follow progressive discipline and where CBA required that “degree of discipline shall be reasonably related to the seriousness of the offense and the employee's

record” and teacher had discipline-free career for over 11 years); *Collins v. School Bd. of Dade Cty.*, 676 So. 2d 1052, 1053 (Fla. 3d DCA 1996) (remanding for issuance of lesser sanction where six-month suspension failed to follow progressive discipline, as required by CBA, and was not reasonably related to the seriousness of the offense).

77. Here, the evidence established that Ms. Regan is a dedicated ESE teacher with over twenty years of experience. The training provided by the School focused almost exclusively on the general FSAT standards, even though the standards for providing accommodations to ESE students are vastly different. In fact, those standards are not fully articulated even in the Guide, as it leaves open the possibility for other, unspecified accommodations based on the needs of the student. Even the School Board’s witnesses with expertise in this area had trouble articulating all of the restrictions that apply for accommodating ESE students.

78. Moreover, the School assigned Ms. Regan to a testing room with 19 ESE students who needed constant attention and only provided her with one proctor (who was proctoring her first FSAT with ESE students) to assist. To make matters worse, Ms. Regan requested the same version of the FSAT be given to all 19 students so she could provide accommodations to everyone at one time, in line with how she accommodated the students during their practice tests. Because that request was denied, Ms. Regan had to apply a different accommodation approach during the FSAT, despite the Guide’s requirement that the FSAT mirror the practice tests. This was unfair to Ms. Regan, who had to improvise on the fly and juggle the repeated requests for accommodations from 19 ESE students. It also was unfair to the students, who had to take the FSAT under different circumstances than their practice tests and wait long periods of time while Ms. Regan and Ms. Smith scrambled to help all of the students.


79. Based on the Findings of Fact and Ultimate Findings of Fact above and considering all of the evidence, the undersigned finds that Ms. Regan’s

actions—even if the School Board had proved that she engaged in sufficient misconduct to discipline her—would not justify skipping progressive discipline and moving straight to the ultimate sanction of termination. Instead, a verbal warning as the first step to progressive discipline would have been appropriate.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Petitioner, Polk County School Board, issue a final order reinstating the Respondent, Jean Regan, as a classroom teacher and awarding her back pay to the date on which the School Board first suspended her without pay.

DONE AND ENTERED this 26th day of February, 2020, in Tallahassee, Leon County, Florida.



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ANDREW D. MANKO  
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Filed with the Clerk of the  
Division of Administrative Hearings  
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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.