

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

BREVARD COUNTY SCHOOL BOARD,

Petitioner,

v.

Case No. 19-2194TTS

LISA S. LEMIEUX,

Respondent.

PETITIONER’S PROPOSED RECOMMENDED ORDER

COMES NOW Petitioner, Brevard County School Board (“School Board” or “Petitioner”), and pursuant to Rule 29-106.215, Florida Administrative Code, submits this Proposed Recommended Order, which incorporates Petitioner’s Proposed Findings of Fact and Proposed Conclusions of Law, in the above referenced case. For the reasons set forth below, Petitioner has proved by a preponderance of the competent, substantial, and credible evidence that there is ample just cause to support the dismissal of Respondent Lisa S. Lemieux (“Respondent” or “Lemieux”). Petitioner therefore respectfully requests that the Administrative Law Judge issue an order recommending that the Brevard County School Board enter a Final Order terminating Respondent from her employment with Brevard Public Schools.

I. STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner had just cause to terminate Lemieux from employment with the Brevard County School Board.

II. PRELIMINARY STATEMENT

Petitioner seeks a recommendation from the Administrative Law Judge supporting the Brevard County School Board's decision to terminate Respondent Lisa Lemieux from her employment with the School District. As the overwhelming testimony and documentary evidence presented at the hearing made clear, Lemieux was placed on probation following several years of poor performance, culminating in three consecutive years of performance evaluations in which she received an overall rating of "needs improvement" for the 2015-2016, 2016-2017 and 2017-2018 school years. Lemieux was then placed on a 90-day probationary period pursuant to § 1012.34(4), Florida Statutes, at the end of which Lemieux failed to attain satisfactory improvement and thus Brevard Public Schools had sufficient grounds to terminate her employment.

III. PROCEDURAL HISTORY

In a letter dated March 26, 2019, Superintendent Dr. Mark Mullins notified Lemieux that he intended to recommend the termination of her employment to the Brevard County School Board ("School Board"). (Pet. 41). The basis for Dr. Mullins' recommendation was as follows:

1. On October 29, 2018, you were provided a 90-day notice advising of performance-related concerns based upon three years of unsatisfactory annual evaluations.
2. Several performance review meetings were held with you, your union representative, and your school Principal to discuss your progress.
3. A review of your past evaluations indicates several attempts at corrective activities through the use of District Peer Mentors and Resource Teachers.
4. After the completion of the 90-day plan, adequate progress was not obtained and is grounds to sever the Professional Services Contract. (Pet. 41).

Through her attorney, Lemieux requested an administrative hearing pursuant to § 120.57, Fla. Stat., on the allegations that constitute grounds for her termination. This cause came before the Division of Administrative Hearings (“DOAH”) and was assigned to Administrative Law Judge Linzie F. Bogan. The hearing was held on December 10, 2019. The following witnesses testified on behalf of Petitioner:

- Dr. Karyle Green
- Lena Wiebelt
- John Hayes
- Bridget Reed
- Burt Clark
- Mark Mullins

Respondent did not present the testimony of any witnesses on her behalf. The transcript, consisting of 240 pages, was filed on January 13, 2020. By agreement of both parties, the deadline for the parties to file their respective proposed recommended orders is February 14, 2020.

IV. PROPOSED FINDINGS OF FACT

Background

1. Respondent, Lisa Lemieux, was hired by Brevard Public Schools (“BPS”) pursuant to an annual teaching contract in November 2006. (Pet. 2).

2. During the 2009-2010 school year, Dr. Mark Mullins, currently BPS’ Superintendent, who at the time served as Principal at Clearlake Middle School, recommended that Lemieux receive a professional services contract. (Pet. 3).

3. During her employment, Lemieux held several different teaching assignments, including self-contained ESE, ESE math and resource math. (Tr. 59:4-18; 66:4-23; 60:11-13; 61:2-9; Pet. 4, 6).

4. Dr. Mullins has been employed by Brevard Public Schools for approximately 26 years. (Tr. 210:3-10). During his employment with BPS, Dr. Mullins has served in a variety of positions with the school district, including math teacher, assistant principal, principal, area superintendent and chief operating officer. (Tr. 210:11-23).

5. Dr. Karyle Green currently serves as the Director of Professional Standards and Labor Relations. (Tr. 18:4-8). Dr. Green has over thirty (30) years of experience in administration and has worked as a school principal, as well as an assistant superintendent in the areas of human resources and school management, and as a school superintendent in another school district. (Tr. 18:11-19:3).

BPS' Teacher Evaluation System

6. BPS uses an Instructional Evaluation System, which is commonly referred to as the IPPAS manual, to evaluate the performance of the school district's instructional personnel. (Pet. 46).

7. BPS' instructional evaluation system evaluates teachers on a rubric consisting of five dimensions. (Pet. 46, beginning on p. 19; Tr. 27:9-28:3). These dimensions are Dimension 1: Instructional Design and Lesson Planning; Dimension 2: Learning Environment; Dimension 3: Instructional Delivery and Facilitation; Dimension 4: Assessment; and Dimension 5: Professional Responsibilities and Ethical Conduct. (Pet. 46, beginning on p. 19; Tr. 27:9-28:3).¹

¹ During the time period relevant to this case, the dimensions of the rubric have not changed. (Tr. 28:5-15).

8. Dimensions 2 and 3 are the dimensions which are readily observable in a classroom setting. (Tr. 31:10-32:1).

9. Pursuant to Florida law, the Department of Education is required to approve the school district's evaluation system on an annual basis. (Tr. 32:2-7).

10. The evaluation system is negotiated with the teacher's union and the school district meets annually with the union to address any issues concerning the evaluation process. (Tr. 32:8-15).

11. Teachers and evaluators receive yearly training regarding the evaluation process and have access to the IPPAS manual through the school district's online portal. (Tr. 32:16-25; 33:11-24; 33:1-10).

12. The yearly evaluation process consists of several components, including formal and informal observations, an administrator evaluation of professional practices, mutual accountability and student achievement. (Tr. 20:1-21:3; Pet. 46, p. 49-50).

13. Part 1 of the Summative Evaluation is completed in the spring of each school year and consists of the principal's annual evaluation, a teacher's self-assessment and the collaboration and mutual accountability score. (Tr. 28:16-29:23; Pet. 46, p. 49-50).

14. Part 2 of the Summative Evaluation adds in the student achievement score or Value-Added Measure (VAM) score. (Tr. 20:1-21:3; Pet. 46, p. 49-50). Part 2 of the Summative Evaluation is completed after student achievement data is received by the school district from the State, typically in the fall for the previous school year. (Pet. 46, pp. 49-50).

15. The largest component of the overall evaluation score is the principal's Annual Evaluation of Professional Practice, which is based on the administrator's formal and informal

observations, as well as the assessment of the teacher's professional practices and professional responsibility. (Tr. 28:16-29:23; Pet. 46, p. 49-50).

16. The principal's Annual Evaluation of Professional Practice accounts for 63% of a teacher's overall evaluation. (Pet. 46, pp. 1, 49-50). The other components of the overall evaluation score, collaboration/mutual accountability and VAM score account for 4% and 33% of a teacher's overall evaluation score, respectively. (Pet. 46, p. 49-50).

17. Florida law requires teachers to be evaluated on instructional practice, which occurs through classroom observation, as well as the administrator's observations concerning professionalism and professional practices, which may occur outside of the classroom. (Tr. 29:24-31:9).

18. Classroom observations, both formal and informal, focus on a teacher's professional practices. (Tr. 20:1-21:3). An informal observation is an unannounced classroom visit by the administrator to observe certain components of the rubric. (Tr. 24:12-24). A teacher has at least one informal observation each school year, but there is no limitation on the number of informal observations that a teacher may receive. (Tr. 24:25-25:6; Pet. 46, pp. 49-50).

19. A formal observation is a classroom visit that is announced to the teacher and involves a pre-conference and post-conference between the principal and the teacher to discuss expectations and the administrator's observations. (Tr. 25:7-24; Pet. 46, pp. 49-50).

20. A principal may perform an interim evaluation for a teacher, which is a full evaluation of professional practice, at any point during the school year when the principal determines that a teacher is struggling with one or more dimensions in the rubric. (Tr. 26:13-27:8; Pet. 46, pp. 49-50).

21. Teachers who are struggling with any of the dimensions of the rubric may also be placed on a Professional Development Assistance Plan (“PDAP”), which is intended to be a collaborative process between the teacher and principal to assist the teacher in areas that need improvement, as identified in their performance evaluation. (Tr. 33:25-34:25; Pet. 46, pp. 15, 49-50).

22. PDAPs are not disciplinary and are designed to provide a teacher with opportunities for professional development, including online resources, training activities and courses, as well as the opportunity to work with BPS’ resource teachers and district peer mentor teachers. (Tr. 34:20-35:17).

23. Lemieux was on a PDAP for several years prior to her termination. (Tr. 35:23-36:2).

24. Throughout her employment, Lemieux received extensive professional development opportunities and support from the school district. (Tr. 36:16-37:2; Pet. 13, 18, 19, 24, 30).

2014-2015 School Year

25. Lena Wiebelt served as Principal of Hoover Middle School from 2014 until 2017. (Tr. 56:16-18). As Hoover’s Principal, Wiebelt completed Lemieux’s performance evaluations for the following school years: 2014-2015; 2015-2016; and 2016-2017. (Pet. 9, 14, 20).

26. During the 2014-2015 school year, Lemieux was initially assigned to teach a self-contained ESE class, but was transferred to a resource math class following disciplinary issues. (Tr. 59:4-18; 66:4-23; 60:11-13; Pet. 4, 6). Lemieux remained in this assignment for the remainder of the time that Wiebelt served as Hoover’s Principal. (Tr. 59:4-18; 66:4-23; 60:11-13; Pet. 4, 6).

27. As a resource math teacher, Lemieux taught Math 2 to ESE students, mainly 7th graders². (Tr. 61:2-9). As a resource math teacher, Lemieux taught six classes. (Tr. 61:10-14).

28. Immediately following Lemieux's move to the resource math teacher position, Wiebelt gave her a clean slate by eliminating her existing PDAPs in order to give Lemieux a chance to acclimate to the new position. (Tr. 62:25-63:20). Wiebelt then waited a period of time before observing Lemieux again, however when she did, Wiebelt continued to have specific concerns related to Lemieux's content-specific student instruction and classroom management. (Tr. 68:5-14; 63:21-64:16).

29. Thereafter, during the 2014-2015 school year, Lemieux was placed on PDAPs for the following dimensions: Dimension 5: Professional Responsibilities and Ethical Conduct; Dimension 2: Learning Environment; and Dimension 3: Instructional Delivery and Facilitation. (Pet. 7).

30. Lemieux failed to satisfactorily complete her PDAPs concerning Dimensions 2 and 3 and they were therefore continued to the 2015-2016 school year. (Pet. 7, PET 000337-000340)

31. Lemieux was offered supports from the school district to assist her with her PDAPs, including but not limited to, working with a district peer mentor teacher. (Tr. 68:15-25).

32. Wiebelt conducted informal observations of Lemieux on the following dates: 10/20/2014, 11/18/2014, 2/19/2015, 3/20/2015, and 5/5/2015. (Pet. 8; Tr. 69:9-21).

33. Wiebelt provided notice to Lemieux of her specific areas of concerns and provided Lemieux with access to notes concerning her observations. (Pet. 8). In these notes,

² The school district no longer teaches resource math as it has moved towards an inclusion model of teaching ESE students. (Tr. 61: 2-9).

Wiebelt offered Lemieux detailed feedback related to the performance concerns she identified. An example of the specific nature of the Wiebelt's feedback and suggested improvements is contained in her October 20, 2014 informal observation, where Wiebelt asked Lemieux under Dimension 3: "Have you tried working with all three students simultaneously using a variety of instructional strategies to meet all their academic outcomes?" (Pet. 8, PET000894). This is one of countless examples of the detailed feedback concerning Lemieux's performance that she was provided.

34. Wiebelt also performed interim evaluations of Lemieux dated November 19, 2014 and February 25, 2015, which likewise contained detailed concerns regarding Lemieux's performance. (Pet. 8, PET000899-000901, PET000907-000909).

35. In her Part 1 annual evaluation for the 2014-2105 school year, Lemieux received a "needs improvement" rating because Wiebelt believed there were significant issues with Lemieux's performance, specifically classroom management, instruction and the actual math content Lemieux was teaching. (Tr. 71:2-11; 70:16-71:1; Pet 9).

36. After factoring in the VAM score in her Part 2 evaluation, Lemieux received a rating of effective for the 2014-2015 school year. (Pet. 10).

2015-2016 School Year

30. At the start of the 2015-2016 school year, Lemieux remained on PDAPs in Dimensions 1, 2 and 3. (Pet. 11).

31. Wiebelt met regularly with Lemieux regarding the PDAPs to track her progress and efforts to improve her performance in the classroom. (Tr. 73:17-74:6). However, Wiebelt believed that Lemieux was not engaged in the process as she failed to complete suggested tasks or to provide any evidence that she had made improvements. (Tr. 74:7-24).

32. During the 2015-2016 school year, Lemieux continued to work with a district peer mentor teacher, although at Lemieux's request, she switched peer mentor teachers and began working with district peer mentor teacher John Hayes. (Tr. 72:24-73:16).

33. Although he visited her classroom frequently to provide assistance to Lemieux, Hayes recalled that she was not engaged in the process and refused to communicate with him during his visits to her classroom. (Tr. 97:3-99:1; 100:23-101:12). Although Lemieux refused to communicate directly with Hayes, he continued to provide her with written feedback after each visit to her classroom. (Tr. 97:3-99:1; 100:23-101:12; Pet. 13).

34. During the 2015-2016 school year, Lemieux had the opportunity to observe other teachers and to engage in professional development activities. (Tr. 72:24-73:16). All the supports requested by Lemieux were provided to her and she was not denied any support that she requested. (Tr. 74:25-75:13).

35. During the 2015-2016 school year, Wiebelt conducted several formal and informal observations of Lemieux in which she consistently advised Lemieux that her performance in the observed dimensions was unsatisfactory. (Pet. 12, PET000923-24, PET000930-31, PET000933-34, PET000939-40; Tr. 75:17-24).

36. Wiebelt also conducted two interim evaluations of Lemieux for the 2015-2016 school year which were triggered by observations and the PDAPs. (Tr. 75:25-77:24).

37. However, Lemieux apparently disagreed with Wiebelt's assessment of her performance. In the two self-assessments that Lemieux performed of her own performance during the 2015-2016 school year, she rated herself as proficient in all categories. (Pet. 12, PET000927-38, PET000943-44).

38. Lemieux received a rating of “needs improvement” in her Part 1 Evaluation for the 2015-2016 school year. (Pet. 14; Tr. 78:11-18).

39. When Lemieux’s Part 2 evaluation for the 2015-2016 school year was completed, she received an overall rating of “needs improvement”. (Pet. 15).

2016-2017 School Year

40. While Lemieux’s PDAPs for the 2015-2016 school year were not closed out, rather than simply continuing them, Wiebelt conducted an informal observation of Lemieux prior to instituting PDAPs for the 2016-2017 school year. (Tr. 80:1-18).

41. In her initial informal observation for the 2016-2017 school year, Wiebelt determined that Lemieux had not made any improvement from the previous school year. (Tr. 80:18-81:2).

42. Accordingly, Wiebelt placed Lemieux on PDAPs for the 2016-2017 school year in Dimensions 1, 2 and 3, notably the same dimensions in which she previously struggled and had been on PDAPs for the 2015-2016 school year. (Tr. 81:3-9; Pet. 16).

43. When Wiebelt presented Lemieux with the PDAPs for the 2016-2017 school year, Lemieux responded that three PDAPs were too much for her to focus on and she chose only to focus on one of the three PDAPs. (Tr. 81:25-84:6; Pet 16, PET 000068).

44. During the 2016-2017 school year, Lemieux continued to work with a district peer mentor teacher. (Tr. 84:7-22). Lemieux began working with Peer Mentor Teacher Bridget Reed. (Tr. 109:8-19). Reed regularly visited Lemieux’s classroom and provided her with feedback during classroom visits. (Tr. 109:8-19). Reed documented her observations and discussed them with Lemieux. (Tr. 110:23-111:23; Pet. 18, 19).

45. In her work with Lemieux, Reed concentrated on differentiation and math content support. (Tr. 109:25-110:22; 116:25-118:3).

46. Wiebelt continued to document her meetings with Lemieux every two weeks to discuss progress related to the PDAPs. (Tr. 81:10-24). These meetings were regularly attended by both Lemieux and her union representative. (Tr. 84:7-22).

47. During the 2016-2017 school year, Wiebelt conducted several informal and formal observations of Lemieux, which continued to show multiple areas of unsatisfactory performance. (Pet. 17).

48. Wiebelt also conducted an interim evaluation of Lemieux in November 2016, in which she documented several areas of unsatisfactory performance, including her failure to use student data in her instruction, her failure to monitor student learning and failure to use varied instructional strategies. (Tr. 85:23-86:5; Pet. 17, PET000967-970).

49. Despite consistent communication from Wiebelt that there were serious issues with her performance, Lemieux continued to rate her own performance as proficient in all dimensions in her self-assessment. (Pet. 17, PET000971-972).

50. Lemieux received a rating of “needs improvement” in her Part 1 evaluation for the 2016-2017 school year. (Tr. 86:6-88:8; Pet. 20).

51. Lemieux received an overall rating of “needs improvement” in her Part 2 evaluation for the 2016-2017 school year. (Pet. 21).

52. As her principal, Wiebelt believed that Lemieux’s performance was unsatisfactory because she was given every opportunity to improve and was simply not engaged in the process. (Tr. 88:11-89:2).

2017-2018 School Year

53. For the 2017-2018 school year, Hoover's new principal was Bradley Merrill. (Pet. 22).

54. During the 2017-2018 school year Lemieux remained on PDAPs for Dimensions 1, 2 and 3. (Pet. 22).

55. Merrill conducted several formal and informal observations of Lemieux during the 2017-2018 school year, as well as an interim evaluation. (Pet. 23). In each of his observations, Merrill noted specific areas of unsatisfactory performance. (Pet 23).

56. Despite Merrill's feedback and her previous performance evaluations for the 2015-2016 and 2016-2017 school years in which her performance was rated as "needs improvement", Lemieux continued to rate herself as proficient in all dimensions. (Pet. 23, PET000981).

57. Lemieux continued to work with district peer mentor teacher Reed during the 2017-2018 school year on the same dimensions from the previous year. (Tr. 118:8-12; 118:21-119:5).

58. During the 2017-2018 school year, Reed visited Lemieux's classroom 26 times. (Tr. 120:24-121:2; Pet. 24, 25).

59. According to Reed, Lemieux continued to be unreceptive to feedback or to engage in the process. (Tr. 119:14-120:20). Reed did not see any improvement in Lemieux's performance during the 2017-2018 school year. (Tr. 122:8-13).

60. In her Part 1 Evaluation for the 2017-2018 school year, Lemieux was rated as "needs improvement". (Pet. 26).

2018-2019 School Year

61. During the 2018-2019 school year, Burt Clark became the principal of Hoover Middle School. (Tr. 137:1-7; 137:22-25).

62. Lemieux was assigned to teach one 7th grade ESE math class and served as a support facilitator co-teacher (or push-in) teacher in five other math classes, serving the ESE students assigned to a general education math class. (Tr. 138:13-140:5). As a support facilitator, Lemieux was responsible for the learning of the ESE students in the class. (Tr. 140:6-141:13).

63. When he arrived at Hoover, Clark became aware from the outgoing principal, Bradley Merrill, that Lemieux had PDAPs from the 2017-2018 school year that had not been closed out. (Tr. 141:14-142:4).

64. However, rather than continuing the PDAPs as they existed under a previous principal, Clark believed it was important for him to personally observe Lemieux in the classroom and to make his own determination as to whether the PDAPs were necessary based upon his own observations. (Tr. 142:5-22).

65. Clark conducted his first informal observation of Lemieux on October 16, 2018, which caused him to have concerns regarding Lemieux's performance. (Tr. 143:8-144:9; Pet. 34). As a result, Clark implemented PDAPs and conducted an interim evaluation. (Tr. 143:8-144:9; Pet. 34). Clark's concerns included Lemieux's use of instructional time, the rigor of her lessons and her lack of content area knowledge. (Tr. 147:17-148:4; 148:19-149:6; Pet. 34).

66. Clark met with Lemieux and the Union to create the PDAPs in Dimensions 1, 2 and 3, notably the same dimensions that she had been on PDAPs for the last several years under two previous principals. (Tr. 149:7-150:25; Pet. 35).

67. Like Wiebelt and Merrill before him, Clark regularly met with Lemieux regarding her PDAPS and offered her any support that she requested. (Tr. 151:1-152:23). While Clark tried

to engage Lemieux in the process, he felt that she was burnt out and did not want to engage. (Tr. 153:3-16).

68. Lemieux received a “needs improvement” rating for her Part 1 and Part 2 evaluations for the 2018-2019 school year. (Tr. 162:7-22; 204:17-24; Pet. 43, 44).

69. A review of student data for the 2018-2019 school year showed that only two of Lemieux’s students made learning gains, while eight (8) of her students actually exhibited a decline in learning. (Tr. 164:1- 166:24; Pet. 42).

Placement on the 90-day Probationary Period and Recommendation for Termination

70. In the fall of 2018, after student data was received from the State, Lemieux’s 2017-2018 Part 2 evaluation was completed, and she again received an overall rating of “needs improvement”. (Pet. 27).

71. As a result of receiving an overall “needs improvement” rating on her performance evaluations for three consecutive years, Lemieux was placed on 90-day probationary notification of unsatisfactory performance pursuant to 1012.34, Florida Statutes. (Tr. 154:16-155:13; 202:13-25; Pet. 32).

72. In this notification, Lemieux was advised that her professional services contract was on a probationary status for 90 days, during which:

you will be evaluated periodically. You will be apprised of any progress in writing. You will work with the administration of your school to assist you in obtaining opportunities to help correct any noted deficiencies. (Pet. 32).

73. During the 90-day probationary period, Clark worked with human resources to make sure that the correct process was followed. (Tr. 37:12-38:3; Pet. 28). Human resources

prepared a timeline of events that needed to occur during 90-day period and Clark added the specific events to the timeline as they occurred. (Pet. 28).

74. In addition, Lemieux continued to receive support from BPS designed to assist her in improving her performance.

75. Lemieux continued to work with a district peer mentor teacher. (Tr. 123:5-8; 123:18-20; 204:6-11). Lemieux participated in CHAMPs training and observed an exemplary math teacher. (Tr. 123:21-124:14). She also received the assistance of the math content specialist, Teresa Barnwell. (Tr. 128:24-129:6).

76. Clark also continued to regularly meet with Lemieux and union representation during the 90-day period and offered her assistance. (Tr. 156:15-157:15).

77. Clark also conducted several observations of Lemieux in the classroom during 90-day period. (Tr. 158:14-22; 203:21-204:4). Clark conducted 4 informal observations, 2 formal observations, 1 interim evaluation and 3 walk-throughs during the 90-day period. (Pet. 28, 31, 33, 34).

78. However, at the end of the 90-day period based on the totality of the evidence before him, including Lemieux's lack of progress on the PDAPs and his observations of her in the classroom, Clark felt that Lemieux had not made sufficient improvement and he recommended her termination to Dr. Mullins. (Tr. 159:12-161:9; 204:25-205:3; Pet. 40).

37. On March 26, 2019, Dr. Mullins recommended that the School Board terminate Lemieux's professional services contract and her employment with the school district. (Pet. 41).

38. Dr. Mullins made this recommendation based upon his review of Lemieux's last three years of evaluations, as well as his review of the extensive support and training Lemieux had been provided by the school district in its efforts to assist her. (Tr. 211:24-214:10). Dr.

Mullins believes that the school district met its obligations to assist Lemieux. (Tr. 211:24-214:10).

V. ANALYSIS

A. Standard of Review

A School Board employee may be dismissed at any time during the term of his or her contract for just cause, which includes, but is not limited to:

immorality, misconduct in office, incompetency, two consecutive annual performance evaluation ratings of unsatisfactory under s. 1012.34, two annual performance evaluation ratings of unsatisfactory within a 3-year period under s. 1012.34, **three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory under s. 1012.34**, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude. Fla. Stat. § 1012.33(1)(a) (2019) (emphasis added).

A teacher with a professional service contract may be terminated for failure to correct 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); Lake County School Board v. Harkleroad, 2011 WL 2564730 (DOAH, June 24, 2011). Thus, as a matter of law, the just cause required for termination in this case, where the school district sought to terminate Lemieux's employment pursuant to Section 1012.34, Florida Statutes is evidence of 3 years of performance evaluations in which a rating of "needs improvement" were received.

B. Brevard Public Schools had Just Cause to Terminate Lemieux's Employment

It is clear from the undisputed evidence presented that Lemieux received three consecutive years of needs improvement evaluations, for the 2015-2016, 2016-2017 and 2017-2018 school years. (Pet. 15, 21 and 27). Notably, Respondent did not object to these evaluations nor did she put on any evidence at the hearing that would call into question their accuracy. Thus,

it is clear as a matter of law that BPS properly placed Lemieux on the 90-day probationary period in October 2018.

Moreover, the record is clear that the school district diligently followed the requirements of Section 1012.34, Florida Statutes, during Lemieux's 90-day probationary period, which provides that:

During the 90 calendar days, the employee who holds a professional service contract must be evaluated periodically and apprised of progress achieved and must be provided assistance and inservice training opportunities to help correct the noted performance deficiencies. At any time during the 90 calendar days, the employee who holds a professional service contract may request a transfer to another appropriate position with a different supervising administrator; however, if a transfer is granted pursuant to ss. 1012.27(1) and 1012.28(6), it does not extend the period for correcting performance deficiencies. F.S. 1012.34(4)(b)(1).

It is clear that throughout the 90-day period that Clark continued to evaluate Lemieux's performance and to provide her with feedback. Moreover, the school district continued to provide Lemieux with consistent support and training opportunities.

However, ultimately, despite Clark's best efforts and those of the school district as a whole, including the efforts of at least two previous administrators and several district peer mentor teachers, Lemieux failed to adequately improve her performance. Pursuant to Section 1012.34, Florida Statutes, at the conclusion of the 90-day probationary period, Clark, as Lemieux's administrator was conferred the authority to determine whether Lemieux had corrected her performance deficiencies. As set forth in Manatee County School Board v. Davis, 2010 WL 3302816 (Fl. DOAH, 2010) *citing* Pinellas County School Board v. Brown, Case No. 08-3985 (DOAH January 19, 2009):

The authority to make the determination of whether performance deficiencies have been corrected is vested in the administrator conducting the observations at, or near the end of the probationary period. Section 1012.34, Florida Statutes, contemplates subjectivity in the evaluator's

determination, because it requires the superintendent to notify the employee in the event that the deficiencies have not been “satisfactorily” corrected. In other words, the deficiencies must be corrected to the “satisfaction” of the evaluator. So long as the assessment criteria relate to the indicators in the statutes (i.e. student performance, student discipline, knowledge of the assigned subject matter, ability to plan and deliver instruction, the use of technology in the classroom, ability to evaluate instructional needs and to establish and maintain a positive collaborative relationship with students’ families to increase student achievement, or other professional competencies), an unsatisfactory performance determination is justified.

Lemieux’s sole argument appears to be to allege that there were deficiencies with the process by which Burt Clark evaluated Lemieux’s performance during the 90-day probationary period. Supported only by the argument of her counsel, Respondent asserts that because Clark primarily conducted observations during the one class for which she was the teacher of record, Clark’s observations failed to capture the totality of her performance. In his testimony, Clark was very clear that while observations of Lemieux in the classroom in which she was the teacher of record constituted the majority of his classroom observations, he believed that he had sufficient data to assess Lemieux’s classroom performance. (Tr. 159:12-161:9). Clark further testified that his evaluation of Lemieux’s performance at the end of the 90-day period encompassed both his classroom observations of Lemieux’s performance and his overall evaluation of Lemieux, which was based on all information he received regarding Lemieux’s performance as an educator during the 90-day probationary period. (Tr. 174:17-175:8; 194:11-25).

Alternatively, Respondent’s counsel appeared to argue at the hearing that BPS should have waited to receive Lemieux’s Part 2 evaluation for 2018-2019 school year to see whether it showed an improvement. First, this approach is neither required nor contemplated by Florida Statute. Moreover, if this approach were taken, because Part 2 evaluations are not completed

until after the beginning of the following school year, a school district seeking to terminate a teacher for unsatisfactory performance would be doomed to a never-ending cycle of waiting one more year. Ultimately, in this case, such an argument is moot as it is undisputed that Lemieux's 2018-2019 Part 2 evaluation failed to show any improvement and she yet again received a rating of needs improvement. (Pet. 44).

It is abundantly clear that BPS made every effort to work with Lemieux to try to improve her performance to an acceptable level. However, public policy dictates that poor teachers should be removed from public school classrooms. Lemieux was licensed to teach ESE students, a highly in demand category of educator within the school district, that serves its most vulnerable students. It is clear that BPS did not want to give up on Lemieux prematurely and expended a great deal of resources to remediate and assist her. It is significant that three separate administrators at Hoover Middle School came to similar conclusions concerning Lemieux's performance.

Lemieux was simply not engaged in the process. Indeed, based on her yearly self-assessments, Lemieux apparently did not believe there were any issues at all with her performance. Lemieux refused to communicate with the district peer mentor teachers who were assigned to assist her, refused to work on PDAPs and failed to provide evidence to her administrators supporting any efforts she made to improve. Finally, Lemieux just stopped trying altogether. Likewise, she did not participate at all in the hearing where her continued employment with BPS was at stake. While BPS continued to try to engage her with the process, Lemieux consistently flouted these efforts. Ultimately, it is clear that BPS easily carries its burden to show that it had just cause to terminate Lemieux's employment.

VI. PROPOSED CONCLUSIONS OF LAW

1. The Department of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Fla. Stat. §§ 120.569, 120.57, and 1012.33. The School Board is the duly constituted governing body of the School District of Brevard County. Art IX § 4, Fla. Const.; §§ 1001.30 and 1001.33, Fla. Stat.

2. A district school board has the statutory authority to adopt rules governing personnel matters pursuant to sections 1001.42(5), 1012.22(1), and 1012.23. This includes the power to discipline instructional staff, such as classroom teachers.

3. 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.

4. Subsection 1012.33(1)(a), Fla. Stat. provides that instructional staff may be dismissed at any time during the school year for “just cause” which includes “three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory under s. 1012.34”.

5. A tenured teacher may be terminated “for just cause pursuant to section 1012.33, Fla. Stat., or based upon uncorrected performance deficiencies pursuant to section 1012.34, Florida Statutes”. Gabriele v. School Board of Manatee County, 114 So.3d 477, 480 (Fla. 2d DCA 2013) (quoting Orange County School Board v. Rachman, 87 So.3d 48, 49 n.1 (Fla. 5th DCA 2012)), See also §1012.34(4)(b), Florida Statutes (explaining a professional service contract can be recommended for termination based on the failure to satisfactorily correct performance deficiencies); § 1012.33(3)(a), Fla. Stat. (explaining a professional service contract does not have to be renewed if “[t]he district school superintendent, after receiving the recommendation required by Section 1012.34 charges the employee with unsatisfactory performance and notifies

the employee of performance deficiencies as required by Section 1012.34”).

6. § 1012.34, Florida Statutes, authorizes the termination of contracts for failure to correct performance deficiencies. Each school district is required to develop assessment instruments for all teachers and administrators and establish procedures for school districts to follow in identifying a teacher’s performance deficiencies and giving the teacher an opportunity to correct them. § 1012.34(4) states:

(4) NOTIFICATION OF UNSATISFACTORY PERFORMANCE.—If an employee who holds a professional service contract as provided in s. 1012.33 is not performing his or her duties in a satisfactory manner, the evaluator shall notify the employee in writing of such determination. The notice must describe such unsatisfactory performance and include notice of the following procedural requirements:

(a) Upon delivery of a notice of unsatisfactory performance, the evaluator must confer with the employee who holds a professional service contract, make recommendations with respect to specific areas of unsatisfactory performance, and provide assistance in helping to correct deficiencies within a prescribed period of time.

(b)1. The employee who holds a professional service contract shall be placed on performance probation and governed by the provisions of this section for 90 calendar days following the receipt of the notice of unsatisfactory performance to demonstrate corrective action. School holidays and school vacation periods are not counted when calculating the 90-calendar-day period. During the 90 calendar days, the employee who holds a professional service contract must be evaluated periodically and apprised of progress achieved and must be provided assistance and inservice training opportunities to help correct the noted performance deficiencies. At any time during the 90 calendar days, the employee who holds a professional service contract may request a transfer to another appropriate position with a different supervising administrator; however, if a transfer is granted pursuant to ss. 1012.27(1) and 1012.28(6), it does not extend the period for correcting performance deficiencies.

2. Within 14 days after the close of the 90 calendar days, the evaluator must evaluate whether the performance deficiencies have been corrected and forward a recommendation to the district school superintendent. Within 14 days after receiving the evaluator’s recommendation, the district school superintendent must notify the employee who holds a professional service contract in writing whether the performance

deficiencies have been satisfactorily corrected and whether the district school superintendent will recommend that the district school board continue or terminate his or her employment contract. If the employee wishes to contest the district school superintendent's recommendation, the employee must, within 15 days after receipt of the district school superintendent's recommendation, submit a written request for a hearing. The hearing shall be conducted at the district school board's election in accordance with one of the following procedures:

a. A direct hearing conducted by the district school board within 60 days after receipt of the written appeal. The hearing shall be conducted in accordance with the provisions of ss. 120.569 and 120.57. A majority vote of the membership of the district school board shall be required to sustain the district school superintendent's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment; or

b. A hearing conducted by an administrative law judge assigned by the Division of Administrative Hearings of the Department of Management Services. The hearing shall be conducted within 60 days after receipt of the written appeal in accordance with chapter 120. The recommendation of the administrative law judge shall be made to the district school board. A majority vote of the membership of the district school board shall be required to sustain or change the administrative law judge's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment.

7. The procedures followed by Petitioner conformed to the requirements of § 1012.34, Florida Statutes.

8. Lemieux had notice for several years under at least three separate principals that there were serious issues with her performance.

9. Lemieux did not inquire or protest during the intensive assistance provided by BPS regarding the deficiencies in her teaching.

10. Respondent's lack of insight into her own shortcomings as a teacher is both disturbing and distressing. Despite several years of poor evaluations, including three consecutive years of evaluations in which she received a rating of "needs improvement", Lemieux continued

to rate her own performance as proficient, despite overwhelming evidence to the contrary.

11. Accordingly, Respondent has deprived her students, including those with disabilities, of a minimum educational experience.

12. The evidence is clear that, despite the school district's best efforts, there was no improvement in Lemieux's performance during the 90-day probationary period.

13. Lemieux's performance as a teacher continued to be deficient, thus justifying the termination of her employment by the Board.

14. Lemieux did not rebut the Board's evidence as to its findings about her substandard performance. Lemieux did not testify herself, instead raising only unsubstantiated argument through her counsel, that the Board somehow failed to properly evaluate the totality of her performance because the majority of classroom observations performed by Clark during the 90-day period were in the class where she was the primary instructor or follow the statutory process contained in §1012.34, Florida Statutes.

15. Petitioner has proven by a preponderance of the evidence sufficient grounds for Respondent's termination due to her failure to timely correct performance deficiencies, pursuant to the authority of § 1012.34, Florida Statutes.

16. Petitioner has established just cause for the dismissal of Respondent from her employment with the School Board by a preponderance of the competent, substantial, and credible evidence.

Dated this 18th day of February 2020

Respectfully Submitted,

/s/ Shannon L. Kelly
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Proposed Recommended Order was served by E-filing Portal delivery this 18th day of February 2020 upon:

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/s/ Shannon L. Kelly
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