

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

BREVARD COUNTY SCHOOL BOARD,

Petitioner,

v.

DOAH CASE NO. 19-2194TTS

LISA S. LEMIEUX,

Respondent.

RESPONDENT’S PROPOSED RECOMMENDED ORDER

A duly-noticed hearing was conducted on December 10, 2019, in Viera, Florida, before Administrative Law Judge Linzie F. Bogan of the Division of Administrative Hearings (“Division”).

APPEARANCES

For Petitioner: Shannon L. Kelly
Howard Waldman
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For Respondent: Mark S. Levine
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STATEMENT OF THE ISSUE

The issue to be determined is whether just cause exists for Petitioner, Brevard County School Board (“School Board” or “Petitioner”), to terminate Respondent, Lisa S. Lemieux’s (Ms. Lemieux” or “Respondent”), employment as a teacher.

PRELIMINARY STATEMENT

By letter dated March 26, 2019, Dr. Mark Mullins, superintendent of schools for Brevard County, Florida, notified Ms. Lemieux of his recommendation to Petitioner that Petitioner terminate Ms. Lemieux pursuant to Section 1012.34, Florida Statutes, for unsatisfactory performance. The notice afforded Ms. Lemieux 15 days from the date of the notice to appeal the superintendent's recommendation.

On April 4, 2019, Ms. Lemieux timely filed a request for formal hearing in this matter. The School Board terminated Ms. Lemieux at its meeting on April 23, 2019. On April 25, 2019, Petitioner referred the matter to the Division of Administrative Hearings ("Division").

On May 6, 2019, the undersigned issued a "Notice of Hearing" scheduling the formal hearing for October 1 and 2, 2019. On September 3, 2019, a "Motion to Continue" was filed by Ms. Lemieux's attorney. The undersigned granted the motion and rescheduled the hearing for December 1 and 2, 2019. The hearing was held as scheduled on December 1, 2019, and concluded on that date.

At hearing, the School Board offered 46 exhibits and Ms. Lemieux offered 2 exhibits that were entered into evidence. Reference to the School Board exhibits shall be by "P-exhibit number" and, when relevant, page number. Some of the School Board exhibits have been Bate stamped, if so, the Bate stamp number may be used as the page number. Reference to Ms. Lemieux's exhibits shall be by "R-exhibit number" and, when relevant, page number.

The School Board called Dr. Carol Green, Lena Wiebelt, John Hayes, Bridget Reed, Burt Clark and Dr. Mark Mullins as witnesses. In the pre-hearing statement, Ms. Lemieux listed Burt Clark and Dr. Mark Mullins as witnesses, as well as any other witnesses listed by Petitioner. The

witnesses were not called separately by Ms. Lemieux. Ms. Lemieux, although listed by Respondent, did not testify at hearing.

The proceedings were recorded and a one-volume transcript was filed with the Division. Reference to the transcript will be by “T: page number”.

References to statutes are to Florida Statutes (2018) unless otherwise noted.

The parties timely submitted their proposed recommended orders, which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner, Brevard County School Board (“School Board” or “Petitioner”), is the constitutional entity authorized to operate, control, and supervise the public schools in Brevard County, Florida. This includes the power to discipline employees, such as teachers. Section 4, Article IX, Fla. Const.; Sections 1001.42(5), 1012.22(1)(f), and 1012.33, F.S.

2. Respondent, Lisa Lemieux (“Ms. Lemieux” or “Respondent”) holds a bachelor of science degree in Exceptional Student Education (“ESE”). P-1, p. 584. Ms. Lemieux was originally hired by the School Board in 2006 on annual contract as an Exceptional Student Education (“ESE”) teacher. P-2. Beginning in the 2009-2010 school year, Ms. Lemieux held a Professional Services Contract pursuant to Section 1012.33, F.S., with the School Board. P-3; T: 19.

3. At all times relevant to this proceeding, Ms. Lemieux taught at Hoover Middle School (“Hoover”). P-9, p. 343; P-14, p. 329; P-20, p. 327; P-26, 325; P-32; P-40.

4. A collective bargaining agreement (“CBA”) between the School Board and the Brevard Federation of Teachers, Local 2098, governs the relationship between the School Board and its instructional employees. Sections 1012.01(2) and 1012.33, F.S. Both the 2016-2017 and 2017-2018 CBA’s are in evidence. (R-1 and P-45) Among its terms, the CBA requires just cause for dismissal. P-45, pp. 18-19. For purposes of this proceeding, the CBA’s do not differ.

Evaluation System

5. Instructional personnel are required to be evaluated at least once a year. Section 1012.34(3)(a), F.S. The Florida Department of Education (“DOE”) must approve each school district’s evaluation system to ensure that it complies with standards established by the State Board of Education. Section 1012.24(1)(b), F.S. Those standards are provided at State Board of Education Rule 6A-5.030, Florida Administrative Code (“FAC”), District Instructional Personnel and School Administrator Evaluation Systems.

6. In compliance with Section 1012.34, F.S., and Rule 6A-5.030, FAC, the Brevard County School Board has adopted the Instructional Personnel Performance Appraisal System (“IPPAS”) for the evaluation of instructional personnel. P-46. In her testimony, Dr. Carol Green provided an overview of the School Board’s evaluation process beginning at page 20.

7. The evaluation system includes informal and formal observations (T: 24- 25), and midterm, interim (T: 26-27) and annual (T: 28-29) evaluations. These are defined at pages 49-50 of Petitioner’s Exhibit 46. At least one formal observation is required for each instructional employee. A midterm evaluation is provided to teachers in their first year with the school district. An interim evaluation may be provided for teachers with whom an administrator has performance concerns. All instructional employees receive an annual evaluation. The Summative Part 1 makes

up the performance score (up to 67 points) on the annual evaluation for instructional employees.

T: 28. The Summative Part 2 unites the score from the Summative Part 1 (up to 67 points) and student achievement (“VAM”) scores (up to 33 points) for a total (up to 100 points). P-46, p. 50.

8. Professional Development Assistance Plans (“PDAP’s”) are written plans developed for instructional personnel with whom an administrator has performance concerns. These concerns may related to any of the elements in the five dimensions which assess a teacher’s performance in the classroom or may be related to other duties. T: 33-35; P-46, p. 15, 19-46.

Ms. Lemieux’s Teaching Assignments

9. At the beginning of the 2014-2015 school year, Ms. Lemieux taught exceptional student education (“ESE”) students in a self-contained, supported-level class. T: 59, 66. In mid-year (second semester), Ms. Lemieux began teaching a “resource math class” which was composed of all ESE students. T: 59-60. (Math is no longer taught to ESE students in this way, because of inclusion. T: 60-61.)

10. When Ms. Lemieux changed from teaching ESE students in a self-contained class (teaching all subjects), she taught only the resource math class six out of seven periods. The seventh period was her planning period. T: 61.

11. Beginning in the 2017-2018 school year and continuing through the 2018-2019 school year, Ms. Lemieux taught one resource math class for one period of the day. She co-taught or “pushed-in” for five other periods of the day to assist ESE students in math classes. The final period was her planning period. T: 40, 138.

School Year 2014-2015¹

12. Ms. Wiebelt was principal of Hoover for the 2014-2017 school years. T: 56.
13. When Ms. Wiebelt arrived at Hoover, Ms. Lemieux was not on a PDAP. T: 62.
14. In October and November 2014, Ms. Wiebelt observed Ms. Lemieux on two occasions (P-8, pp. 893-894 and 895-897, respectively), prior to issuing an interim evaluation on November 19, 2014. (P-8, pp. 899-901) Thereafter, in November 2014, Ms. Wiebelt placed Ms. Lemieux on a PDAP for Dimensions 2, Learning Environment, and 3, Instructional Delivery and Facilitation. P-7, pp. 331-336.
 15. Following the November 2014 interim evaluation (P-8, 899-902), the PDAP was expanded to include Dimension 1, Instructional Design and Lesson Planning, in January 2016. P-11, pp. 81-82. At the same time, the PDAP for Dimensions 2 and 3 were continued. P-11, pp. 79-80 and 77-78, respectively.
 16. In January 2015, Ms. Lemieux transitioned from the self-contained ESE class to teaching the resource math class six periods a day. T: 62-63.
 17. The PDAP's from fall 2014 did not follow Ms. Lemieux when she moved to the new position, because the strategies did not apply to Ms. Lemieux's new position. T: 64.
 18. Several weeks into the spring 2015 term, Ms. Wiebelt began the accessing Ms. Lemieux in her new position. She conducted a formal observation on February 19, 2015, and issued an interim evaluation on February 25, 2015. P-8, pp. 905-906 and 907-909, respectively.

¹Between pages 55-65 of the transcript, Petitioner's counsel and Ms. Wiebelt repeatedly confuse the first year Ms. Wiebelt arrived at Hoover. Ms. Wiebelt arrived at the beginning of the 2014-2015 school year. T: 56. Any reference to the school year 2013-2014 is actually to the 2014-2015 school year. T: 65-66.

As a result, in March 2015, Ms. Wiebelt placed Ms. Lemieux on a new PDAP for Dimension 2, Learning Environment, and Dimension 3, Instructional Delivery and Facilitation. P-7, pp. 337-340; T: 64-65.

19. On March 20, 2015, both Ms. Wiebelt and Ms. Holli Zander conducted an informal observation of Ms. Lemieux. P-8, pp. 911-912 and 913-914, respectively. Thereafter, Ms. Wiebelt conducted a formal observation on May 5, 2015. P-8, pp. 917-918.

20 Following Ms. Wiebelt's formal observation on May 5, 2015, she prepared Ms. Lemieux's annual evaluation. P-9, pp. 919-921. Overall, Ms. Wiebelt rated Ms. Lemieux as Needs Improvement at 28.75 points, 1.25 points below Proficient, in the Summative Part 1 score. P-9, p. 343.

21. However, after the Summative Part 2 scoring in November 2015, which includes the student's VAM scores, Ms. Lemieux was rated as Effective, with a score of 71.75. P-10.

22. As Ms. Lemieux was rated Effective for the 2014-2015 school year, her performance was satisfactory.

School Year 2015-2016

23. During the 2015-2016 school year, Ms. Lemieux continued to teach the resource math class, mainly to seventh graders. T: 65.

24. The March 2015 PDAP was not completed by the end of the 2014-2015 school year. However, that PDAP did not follow Ms. Lemieux into the 2015-2016 school year. Considering the mid-year transition in January 2015, Ms. Wiebelt waited to access Ms. Lemieux until October 2015 to see whether the PDAP from the spring and time had helped Ms. Lemieux. T: 64-65; 71.

25. As a result of a September 28, 2015, informal observation (P-12, pp. 923-925), and an October 14, 2015, formal observation (P-12, pp. 929-932), Ms. Wiebelt issued an interim evaluation (P-12, pp. 933-935). After this interim evaluation, Ms. Wiebelt placed Ms. Lemieux on a new PDAP beginning in October 2015. The PDAP was for Dimension 2, Learning Environment, and Dimension 3, Instructional Delivery and Facilitation. P-11, pp. 88-90 and 86-87, respectively; T: 72.

26. Between October 30, 2015, and January 28, 2016, Ms. Zander, Ms. Wiebelt and James Macheras each conducted an informal observation. P-12, pp. 937-941 and 945-947. On January 28, 2016, Ms. Wiebelt conducted a formal observation (P-12, pp. 949-950) and thereafter issued an another interim evaluation. P-12, pp. 951-953.

27. As a result of the interim evaluation, on January 29, 2016, Ms. Wiebelt modified Dimensions 2 and 3 of Ms. Lemieux's PDAP and expanded it to include Dimension 1, Instructional Design and Lesson Planning. P-11, pp. 77-82. T: 73.

28. On April 18, 2016, Ms. Wiebelt issued Ms. Lemieux's annual evaluation for the 2015-2016 school year. Ms. Lemieux's Summative Part 1 score was 27.71, a Needs Improvement rating. That year the Needs Improvement rating spanned from 18.45 to 39.44. P-14, pp. 329.

29. On November 2, 2016, the Summative Part 2 score issued after the student VAM scores were received. Ms. Lemieux's student VAM score was 29.0 resulting in an overall score of 56.71. Ms. Lemieux's score remained in the Needs Improvement range of 45.5-68.4. P-15; T: 78.

School Year 2016-2017

30. Ms. Lemieux continued to teach the resource math class six periods a day.

31. Ms. Lemieux's PDAP's from 2015-2016 for Dimensions 1, 2, and 3 continued throughout the 2016-2017 school year. P-16

32. Ms. Wiebelt informally observed Ms. Lemieux on September 30, 2016.

Thereafter, she issued an interim evaluation on November 16, 2016. P-17, pp. 959-961 and 967-969, respectively.

33. Ms. Wiebelt informally observed Ms. Lemieux on March 22, 2017, which was followed by a formal observation on April 4, 2017. P-17, pp. 963-965 and 973-975, respectively.

34. Thereafter, Ms. Wiebelt issued Ms. Lemieux annual evaluation on April 5, 2017. Ms. Lemieux's Summative Part 1 score was 20.42. This rating was in the Needs Improvement range of 18.45-39.44. P-20.

35. Following the incorporation of the student VAM scores, Ms. Lemieux's Summative Part 2 rating for the 2016-2017 school year was released on November 2, 2017. Ms. Lemieux scored 50.42. This is in the Needs Improvement range of 45.45-68.44. P-21.

School Year 2017-2018

36. Ms. Wiebelt left Hoover after the 2016-2017 school year and Bradley Merrill became the new principal. T: 56; 141. Mr. Merrill did not testify in this proceeding.

37. Ms. Lemieux's teaching duties changed this year. She taught only one resource math class and co-taught or "pushed-in" five periods a day. T: 40.

38. Ms. Lemieux remained on the PDAP's for Dimensions 1, 2, and 3 from the previous school year for the 2017-2018 school year. At the end of the 2017-2018 school year,

although the PDAP's may have been revised during the year, none was closed out. P-22; T: 141-142; 175-176.

39. Mr. Merrill issued an interim evaluation of Ms. Lemieux on October 2, 2017. P-23, pp. 983-984.

40. There is no record evidence that Mr. Merrill or another administrator conducted an informal or formal observation of Ms. Lemieux's classroom performance prior to Mr. Merrill issuing this interim evaluation or revising the PDAP's as is required. P-46, p. 49. It is noted that the PDAP's for the 2017-2018 school year all have an initial discussion date of October 2, 2017. P-22.

41. Subsequent to the October 2017 interim evaluation, Mr. Merrill did conduct informal observations of Ms. Lemieux on November 7 and December 8, 2017, and January 19, February 1 and 26, March 15, and April 9 and 24, 2018. P-23, pp. 985-992, 995-1002.

42. Mr. Merrill formally observed Ms. Lemieux on May 2, 2018. P-23, pp. 1003-1004.

43. Also on May 2, 2018, Mr. Merrill issued Ms. Lemieux's annual evaluation. Ms. Lemieux's Summative Part 1 score, 34.58, improved greatly over the previous year's score of 20.42. However, the score of 34.58 was still in the Needs Improvement range of 18.45-39.44. P-25.

44. On October 19, 2018, Ms. Lemieux's student VAM score of 30 for the 2017-2018 school year was reported. As a result, Ms. Lemieux's Summative Part 2 score for 2017-2018 school year was 64.58. Although greatly improved over the previous year's 50.42, the 2017-2018 score was still in the Needs Improvement range (45.45-68.44). P-27.

School Year 2018-2019

45. Burt Clark replaced Mr. Merrill as Hoover's principal for the 2018-2019 school year. T: 137.

46. During the 2018-2019 school year, Ms. Lemieux continued to teach the one resource math class, where all the students were ESE. Ms. Lemieux was a co-teacher or "push-in" in an additional five classes with two other teachers. Her duties in the five classes included providing additional support to ESE students in those classes. Ms. Lemieux and the other teacher(s) worked together to serve the students in the room. In at least four of the "push-in" classes, there was a substantial number of ESE students. T: 138-139; 174.

47. For the "push-in" classes, Ms. Lemieux worked with the general education teacher to create lesson plans designed for the ESE students based on what the teacher of record was teaching. It is common that an ESE student would need extra support, "scaffolding" or differentiation to attain the goal or standard the teacher of record was trying to attain. Ms. Lemieux would make decisions on how to support the student and whether the student was ready to move on. T: 140-141.

IPPAS Process

48. Ms. Lemieux's PDAP's from the 2017-2018 school year continued through the 2018-2019 school year. P-35; T: 142-146.

49. It was Mr. Clark's opinion that Ms. Lemieux was engaged in the PDAP process. T: 153-154.

50. Mr. Clark conducted an informal observation of Ms. Lemieux on October 16 and a

formal observation on October 30, 2018. P-34, pp. 1007-1009 and 1011-1013, respectively.² He conducted another informal observation on December 7, 2018. P-34, pp.1017-1018. Thereafter, he issued an interim evaluation dated December 7, 2018. P-34, pp. 1019-1020.

51. Mr. Clark conducted two more informal observations on February 7 and 25, 2019. P-34, pp. 1021-1023 and 1027-1028, respectively.

52. On February 26, 2019, Mr. Clark conducted the final formal observation. As part of this observation, Mr. Clark evaluated all elements in each of the five dimensions, but he did not issue an interim evaluation as a result of this observation. P-36.

53. Ms. Lemieux's annual evaluation is dated April 22, 2019. The Summative Part 1 score in this evaluation is 33.25. This score is in the Needs Improvement range of 18.45-39.44. P-43.

54. Ms. Lemieux's Summative Part 2 score issued in October 2019 for the 2018-2019 school year. After applying the student VAM score of 30.00 to Ms. Lemieux's Summative Part 1 score, Ms. Lemieux had an overall score of 63.25. This score is in the Needs Improvement range of 45.45-68.44. P-44.

Mr. Clark's Observations and Evaluations

55. During the 2018-2019 school year, Ms. Lemieux taught one resource math class and co-taught or "pushed-in" in five other classes in which another teacher was the teacher of record.

²It is understood from Mr. Clark's testimony that the dates provided on the various observations and evaluations are the dates the information was input into the computer. This may not be the same date the observation occurred or that the evaluation was provided to Ms. Lemieux. T: 143.

56. IPPAS requires that administrators informally and formally observe instructional personnel in the classroom. These observations are to be documented and may lead to interim evaluations, PDAP's or the annual evaluation.

57. During the 2018-2019 school year, Mr. Clark conducted four informal observations and two formal observations. See, paragraphs 50, 51 and 52, above.

58. Review of the forms for these observations (P-34 and P-36), as well as Mr. Clark's notes (P-31) indicate that all of the observations were of Ms. Lemieux's one resource math class.

59. Even though Mr. Clark was in the room, he made no attempt to observe, informally or formally under IPPAS, Ms. Lemieux in any of the five co-teaching or "push-in" classes. Mr. Clark's "observation" of Ms. Lemieux in those five classes was limited to the non-technical meaning of the word "observation"--he merely saw her in the room and did not attempt to assess her performance. P-31; P-34; P-36; T: 159-161.

Student Data

60. Mr. Clark testified that some students, depending on their learning styles or disabilities (in the case of ESE students), do not perform well on the state assessment tests which make up the student performance VAM scores. T: 189-190. Nonetheless, the School Board attempted to show that Ms. Lemieux was ineffective through these scores for the 2018-2019 school year showing student learning gains. P-42; T: 164.

61. These scores are for the students in Ms. Lemieux's resource math class. The scores show that five students had learning gains, four students' scores dropped and three students had no scores for the previous year and, therefore, learning gains could not be determined. P-42.

62. In isolation, these scores have little value as they were not compared with comparable (ESE) students throughout the school or the school district.

63. Further, no attempt was made to quantify Ms. Lemieux's impact on any of the ESE students in the five push-in classes at all. T: 199.

90-Day Plan

64. On November 1, 2018, Mr. Clark notified Ms. Lemieux that her professional services contract was being placed on probation due to her rating of Needs Improvement on the previous three, consecutive annual evaluations. The notice indicated that Ms. Lemieux would be evaluated periodically during the probation period and notified of progress achieved in correcting any noted deficiencies. Further, at the end of the 90 days, the administration would assess Ms. Lemieux's progress within 14 days and if she did not rate as Effective overall on the Summative Part 1 the administration would notify the Superintendent. P-32.

65. It is noted that the notice to Ms. Lemieux was supposed to be provided on October 29, 2018. P-28 and P-32. The delivery of the notice was delayed until November 1. P-32. The original end-date for the 90-day plan was February 25. P-28 and P-32. Because of the delay in notifying Ms. Lemieux, the end-date of the plan should have been moved back to February 28.

66. Further, the 90-day notice failed to comply with Section 1012.34(4), F.S. The statute requires the perceived deficiencies to be listed in the notice.

67. On February 26, 2019, Mr. Clark conducted a formal observation of Ms. Lemieux covering the elements in each dimension, but he did not issue an interim evaluation. P-36.

68. In a memorandum dated March 6, 2019, after the end of the 90-day period, Mr.

Clark advised Dr. Mullins of Ms. Lemieux’s overall unsatisfactory performance appraisal. Further, Mr. Clark recommended Ms. Lemieux’s termination. This memorandum noted the wrong date, February 25, 2018, as the end date of the 90-day probation. P-40.

69. By letter dated March 26, 2019, Dr. Mullins advised Ms. Lemieux that he was recommending the School Board terminate her professional services contract (“PSC”) due to unsatisfactory performance. P-41. At its meeting on April 23, 2019, the School Board accepted the Superintendent’s recommendation. This proceeding ensued.

CONCLUSIONS OF LAW

Jurisdiction

70. The Division of Administrative Hearings (“Division”) has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569, 120.57(1), and 1012.34(3), F.S.

Authority to Terminate

71. In accordance with the provisions of Article IX, Subsection 4(b), Florida Constitution, and Chapter 1001, F.S., district school boards have the authority to operate, control, and supervise all free public schools in their respective districts. A school board’s authority extends to personnel matters and includes the power to suspend and dismiss employees. Sections 1001.32(2), 1001.42(5), 1012.22(1)(f), and 1012.23(1), F.S. Pursuant to Subsections 1012.22(1)(f) and 1012.40(2)(c), F.S., a school board has the authority to terminate or suspend school personnel without pay and benefits.

72. Under Subsection 1012.34(4)(b)2, F.S., a school board has the authority, upon recommendation by the district school superintendent, to terminate the employment of an

employee holding a professional services contract for failure to correct unsatisfactory performance within the 90-day probation period prescribed by statute.

De Novo Appeal

73. When an employee contests a superintendent's recommendation of dismissal, the ensuing hearing must be conducted in accordance with Chapter 120, F.S. Section 1012.34(4)(b)2.a. and b., F.S. A Chapter 120, F.S., proceeding entails a de novo hearing intended to 'formulate final agency action, not to review action taken earlier and preliminarily.' Young v. Department of Community Affairs, 625 So.2d 831, 833 (Fla. 1993), quoting McDonald v. Department of Banking & Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977). Thus, Petitioner's burden was to persuade the undersigned Administrative Law Judge to find, independently, that Respondent's performance was deficient. Compare: Miami-Dade County School Board v. Rojas, Case No. 05-0942 (DOAH July 29, 2005), and Miami-Dade County School Board v. Escalona, Case No. 04-1654 (DOAH November 23, 2004), 2004 WL 2683123 *8 (Fla. Div. Admin. Hrgs. 2004); See generally Haines v. Department of Children and Families, 983 So.2d 602, 606-607 (Fla. 5th DCA 2008).

Burden of Proof

74. The burden of proof applicable to this proceeding is preponderance of the evidence. Pinellas County School Board v. Brown, Case No. 08-3985 (DOAH January 23, 2009); Miami-Dade County School Board v. Gomez Case No. 04-2335 (DOAH October 29, 2004).

75. The "preponderance of the evidence" is "the greater weight of the evidence," or evidence that more likely than not tends to prove a certain proposition. See Gross v. Lyons, 763

So.2d 276, 280 N. 1 (Fla. 2000); see also Williams v. Eau Claire Pub. Sch., 397 F.3d 441, 446 (6th Cir. 2005) (holding trial court properly defined the preponderance of the evidence standard as “such evidence as, when considered and compared with that opposed to it, has more convincing force and produces . . . [a] belief that what is sought to be proved is more likely than not true”).

Termination is Penal in Nature

76. Because the statutes and rules providing the grounds for the termination of a teacher’s employment are penal in nature, they must be construed in favor of the employee.

Rosario v. Burk, 605 So.2d 523, 524 (Fla. 2d DCA 1992); Lester v. Department of Professional & Occupational Regulations, 348 So.2d 923, 025 (Fla. 1st DCA 1977).

Professional Services Contract

77. Since 2009, Ms. Lemieux has held a professional services contract (“PSC”) with the School Board. PSC’s are governed by Section 1012.33, F.S. Section 1012.33, F.S., states in relevant part the following.

1012.33 Contracts with instructional staff, supervisors, and school principals.—

(1)(a) Each person employed as a member of the instructional staff in any district school system shall be properly certified pursuant to s. 1012.56 or s. 1012.57 or employed pursuant to s. 1012.39 and shall be entitled to and shall receive a written contract as specified in this section. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: 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.

(b) A supervisor or school principal shall be properly certified and shall receive a written contract as specified in this section. Such contract may be for an initial period not to exceed 3 years, subject to annual review and renewal. The first 97 days of an initial contract is a probationary period. During the probationary period, the employee may be dismissed without cause or may resign from the contractual position without breach of contract. After the first 3 years, the contract may be renewed for a period not to exceed 3 years and shall contain provisions for dismissal during the term of the contract only for just cause, in addition to such other provisions as are prescribed by the district school board.

* * *

(3) A professional service contract shall be renewed each year unless:

(a) The district school superintendent, after receiving the recommendations required by s. 1012.34, charges the employee with unsatisfactory performance and notifies the employee of performance deficiencies as required by s. 1012.34; or

(b) The employee receives 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, or three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory under s. 1012.34.

* * *

(6)(a) Any member of the instructional staff, excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a). The district school board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid. If the employee

wishes to contest the charges, the employee must, within 15 days after receipt of the written notice, submit a written request for a hearing. Such hearing shall be conducted at the district school board's election in accordance with one of the following procedures:

1. 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

2. 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.

Any such decision adverse to the employee may be appealed by the employee pursuant to s. 120.68, provided such appeal is filed within 30 days after the decision of the district school board.

(b) Any member of the district administrative or supervisory staff, including any principal but excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract; however, the charges against him or her must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or being convicted or found guilty of, or entering a plea of guilty, regardless of adjudication of guilt, any crime involving moral turpitude, as these terms are defined by rule of the State Board of Education. Whenever such charges are made against an employee of the district school board, the district school board may suspend the employee without pay; but, if the charges are not sustained, he or she shall be immediately reinstated, and his or her back salary shall

be paid. In cases of suspension by the district school board or by the district school superintendent, the district school board shall determine upon the evidence submitted whether the charges have been sustained and, if the charges are sustained, shall determine either to dismiss the employee or fix the terms under which he or she may be reinstated. If such charges are sustained by a majority vote of the full membership of the district school board and the employee is discharged, his or her contract of employment shall be canceled. Any decision adverse to the employee may be appealed by him or her pursuant to s. 120.68, provided such appeal is filed within 30 days after the decision of the district school board.

* * *

Teacher Performance Assessment and Evaluation

78. Subsection 1012.34(3), F.S., provides the pertinent methodology for teacher performance assessment and evaluation to be followed by local school districts. Subsection 1012.34(4), F.S., provides for the manner of notice of performance deficiencies for instructional personnel, opportunities for corrective action, for a probationary period, and hearing procedures for contesting performance-related issues. Subsection 1012.34(4)(b)2.b., F.S., provides proceeding before an Administrative Law Judge in accordance with Chapter 120, F.S., in the event a recommendation for termination is disputed.

79. Section 1012.34, F.S., states in relevant part the following.

1012.34 Personnel evaluation procedures and criteria.—

(1) EVALUATION SYSTEM APPROVAL AND REPORTING.—

(a) For the purpose of increasing student academic performance by improving the quality of instructional, administrative, and supervisory services in the public schools of the state, the district school superintendent shall establish procedures for evaluating the performance of duties and responsibilities of all instructional, administrative, and supervisory personnel employed by the school district. The district school superintendent shall provide

instructional personnel the opportunity to review their class rosters for accuracy and to correct any mistakes. The district school superintendent shall report accurate class rosters for the purpose of calculating district and statewide student performance and annually report the evaluation results of instructional personnel and school administrators to the Department of Education in addition to the information required under subsection (5).

(b) The department must approve each school district's instructional personnel and school administrator evaluation systems. The department shall monitor each district's implementation of its instructional personnel and school administrator evaluation systems for compliance with the requirements of this section.

* * *

(3) EVALUATION PROCEDURES AND CRITERIA.—Instructional personnel and school administrator performance evaluations must be based upon the performance of students assigned to their classrooms or schools, as provided in this section. Pursuant to this section, a school district's performance evaluation system is not limited to basing unsatisfactory performance of instructional personnel and school administrators solely upon student performance, but may include other criteria to evaluate instructional personnel and school administrators' performance, or any combination of student performance and other criteria. Evaluation procedures and criteria must comply with, but are not limited to, the following:

(a) A performance evaluation must be conducted for each employee at least once a year, except that a classroom teacher, as defined in s. 1012.01(2)(a), excluding substitute teachers, who is newly hired by the district school board must be observed and evaluated at least twice in the first year of teaching in the school district. The performance evaluation must be based upon sound educational principles and contemporary research in effective educational practices. The evaluation criteria must include:

1. Performance of students.—At least one-third of a performance evaluation must be based upon data and indicators of student performance, as determined by each school district. This portion of the evaluation must include growth or achievement data of the teacher's students or, for a school administrator, the students

attending the school over the course of at least 3 years. If less than 3 years of data are available, the years for which data are available must be used. The proportion of growth or achievement data may be determined by instructional assignment.

2. Instructional practice.—For instructional personnel, at least one-third of the performance evaluation must be based upon instructional practice. Evaluation criteria used when annually observing classroom teachers, as defined in s. 1012.01(2)(a), excluding substitute teachers, must include indicators based upon each of the Florida Educator Accomplished Practices adopted by the State Board of Education. For instructional personnel who are not classroom teachers, evaluation criteria must be based upon indicators of the Florida Educator Accomplished Practices and may include specific job expectations related to student support.

3. Instructional leadership.—For school administrators, at least one-third of the performance evaluation must be based on instructional leadership. Evaluation criteria for instructional leadership must include indicators based upon each of the leadership standards adopted by the State Board of Education under s. 1012.986, including performance measures related to the effectiveness of classroom teachers in the school, the administrator's appropriate use of evaluation criteria and procedures, recruitment and retention of effective and highly effective classroom teachers, improvement in the percentage of instructional personnel evaluated at the highly effective or effective level, and other leadership practices that result in student learning growth. The system may include a means to give parents and instructional personnel an opportunity to provide input into the administrator's performance evaluation.

4. Other indicators of performance.—For instructional personnel and school administrators, the remainder of a performance evaluation may include, but is not limited to, professional and job responsibilities as recommended by the State Board of Education or identified by the district school board and, for instructional personnel, peer reviews, objectively reliable survey information from students and parents based on teaching practices that are consistently associated with higher student achievement, and other valid and reliable measures of instructional practice.

(b) All personnel must be fully informed of the criteria, data

sources, methodologies, and procedures associated with the evaluation process before the evaluation takes place.

(c) The individual responsible for supervising the employee must evaluate the employee's performance. The evaluation system may provide for the evaluator to consider input from other personnel trained under subsection (2). The evaluator must submit a written report of the evaluation to the district school superintendent for the purpose of reviewing the employee's contract. The evaluator must submit the written report to the employee no later than 10 days after the evaluation takes place. The evaluator must discuss the written evaluation report with the employee. The employee shall have the right to initiate a written response to the evaluation, and the response shall become a permanent attachment to his or her personnel file.

(d) The evaluator may amend an evaluation based upon assessment data from the current school year if the data becomes available within 90 days after the close of the school year. The evaluator must then comply with the procedures set forth in paragraph ©.

(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.

(5) ADDITIONAL NOTIFICATIONS.—The district school superintendent shall annually notify the department of any instructional personnel or school administrators who receive two consecutive unsatisfactory evaluations. The district school superintendent shall also notify the department of any instructional personnel or school administrators who are given written notice by the district of intent to terminate or not renew their employment. The department shall conduct an investigation to determine whether action shall be taken against the certificate holder pursuant to s. 1012.795.

(6) ANNUAL REVIEW OF AND REVISIONS TO THE SCHOOL DISTRICT EVALUATION SYSTEMS.—The district school board shall establish a procedure for annually reviewing instructional personnel and school administrator evaluation systems to determine compliance with this section. All substantial revisions to an approved system must be reviewed and approved by the district school board before being used to evaluate instructional personnel or school administrators. Upon request by a school district, the department shall provide assistance in developing, improving, or reviewing an evaluation system.

(7) MEASUREMENT OF STUDENT PERFORMANCE.—
1(a) The Commissioner of Education shall approve a formula to measure individual student learning growth on the statewide, standardized assessments in English Language Arts and mathematics administered under s. 1008.22. A third party, independent of the assessment developer, must analyze student learning growth data calculated using the formula and provide access to a data visualization tool that enables teachers to understand and evaluate the data and school administrators to improve instruction, evaluate programs, allocate resources, plan professional development, and communicate with stakeholders. The formula must take into consideration each student's prior academic performance. The formula must not set different expectations for student learning growth based upon a student's gender, race, ethnicity, or socioeconomic status. In the development of the formula, the commissioner shall consider other factors such as a student's attendance record, disability status, or status as an English

language learner. The commissioner may select additional formulas to measure student performance as appropriate for the remainder of the statewide, standardized assessments included under s. 1008.22 and continue to select formulas as new assessments are implemented in the state system.

(b) Each school district may, but is not required to measure student learning growth using the formulas approved by the commissioner under paragraph (a).

(8) RULEMAKING.—The State Board of Education shall adopt rules pursuant to ss. 120.536(1) and 120.54 which establish uniform procedures and format for the submission, review, and approval of district evaluation systems and reporting requirements for the annual evaluation of instructional personnel and school administrators.

Analysis

Section 1012.33, F.S., Not Charged

80. The School Board's charges against Ms. Lemieux cite only Section 1012.34, F.S., as authority to suspend and terminate Ms. Lemieux. P-41. The School Board failed to cite Section 1012.33, F.S., as a basis for its action. Section 1012.33(6)(a), F.S., provides that a member of the instructional staff employed under a professional services contract may be suspended or terminated at any time during the term of his or her contract for just cause, as provided in Section 1012.33(1)(a), F.S. Section 1012.33(1)(a) defines "just cause" to include incompetency. "Incompetency" is defined at Rule 6B-4.009(1), FAC.

81. However, Ms. Lemieux may only be disciplined for matters alleged in the charging document provided to her. Trevisani v. Department of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Cottrill v. Department of Insurance, 685 So.2d 1371 (Fla. 1st DCA 1996)(reference to the statute without supporting factual allegations not sufficient to place respondent on notice of the

charges against him); Jacker v. School Board of Dade County, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring). Thus in this case, the only conduct that is at issue is the conduct identified in the March 26, 2019, letter to Ms. Lemieux. P-41.

82. Accordingly, as the School Board failed to allege that just cause exists to suspend and terminate Ms. Lemieux's employment pursuant to Section 1012.33 and Rule 6B-4.009 in the charging document, it may not rely on those provisions for adverse action against Ms. Lemieux.

Section 1012.34, F.S., Charged

Notice

83. The School Board seeks to terminate Ms. Lemieux pursuant to Section 1012.34, F.S. P-41.

84. However, the School Board's 90-Day Probationary Notification (P-32) to Ms. Lemieux failed to comply with the notification requirements of Section 1012.34(4), F.S., in that the notice itself failed to describe the area(s) of unsatisfactory performance. P-32.

85. Despite the deficiency of the notice, the School Board has demonstrated by a preponderance of the evidence that it complied with the timeliness aspects of the assessment and evaluation requirements during the 90-day probationary period.

86. Following a formal observation on February 26, 2019, assessing her performance (P-36), Mr. Clark notified Dr. Mullins within 14 days of the end of the 90-day probationary period of his recommendation that Ms. Lemieux be terminated. P-40. Thereafter, within 14 days (not counting spring break, P-39) of receipt of Mr. Clark's recommendation, Dr. Mullins notified Ms. Lemieux of his decision to suspend and terminate her employment. P-41. Section 1012.34(4)(b)2., F.S.

Observation and Evaluation

87. Section 1012.34(2)(c) and (d), F.S., requires that the evaluation system for instructional personnel must include performance data from multiple sources, including parent input and identify teaching fields for which special evaluation procedures and criteria are necessary.

88. While under the 90-day probation plan, the only person to informally or formally observe Ms. Lemieux or issue an evaluation was Mr. Clark. P-34; P-36. Hence, there was no attempt by the School Board to have more than one person observe or evaluate Ms. Lemieux's performance.

89. No parental input was considered in Ms. Lemieux's evaluations.

90. Moreover, no special evaluation procedures or criteria were employed to observe and evaluate Ms. Lemieux in the five co-teaching or "push-in" classes. As a consequence, Mr. Clark's informal and formal IPPAS observations failed to include any of the five classes in which Ms. Lemieux was the co-teacher in the "push-in" classes, but instead relied entirely on the one resource math class. Hence, the School Board failed to demonstrate by a preponderance of evidence that Ms. Lemieux failed to correct performance deficiencies under Section 1012.34(3), F.S.

Student Data

91. The School Board failed to demonstrate by a preponderance of evidence that any perceived lack of learning gains in the student performance (VAM scores) in the data provided at P-42 was attributable to Ms. Lemieux's failure to correct performance deficiencies. Nor was there an attempt to evaluate or compare these students' scores on a school- or district-wide basis.

92. Finally, there was no attempt by the School Board to evaluate student performance for students in Ms. Lemieux's in push-in classes.

Conclusion

93. Accordingly, the School Board failed to establish, by a preponderance of evidence, that Ms. Lemieux failed to correct performance deficiencies such that she should be suspended and terminated pursuant to Section 1012.34, F.S.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Brevard County School Board, dismiss all charges against Respondent, Lisa S. Lemieux. Further, it is RECOMMENDED that Petitioner, Brevard County School Board, reinstate Respondent, Lisa S. Lemieux, with full back pay and benefits.

DONE AND ENTERED this _____ day of _____, 2020, in Tallahassee, Leon County, Florida.

Linzey F. Bogan
Administrative Law Judge
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Notice of Rights 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.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was furnished by email to:

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Howard Waldman
Allen Norton & Blue, P.A.
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this 18th day of February, 2020.

Respectfully submitted,

/s/ Ronald G. Stowers

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