AGENDA REQUEST FORM

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

ITEM No.: I-2.

MEETING DATE	2020-04-21 10:00 - Regular School Board Meeting
AGENDA ITEM	ITEMS
CATEGORY	I. OFFICE OF THE SUPERINTENDENT
DEPARTMENT	Office of Chief of Staff

Special Order Request: ○ Yes ◉ No

Time

Open Agenda: ○ Yes ◉ No

TITLE:

Broward County School Board vs. Brenda Joyce Fischer -1

REQUESTED ACTION:

Approve the Final Order adopting the Recommended Order entered on January 21, 2020, by Cathy M. Sellers, Administrative Law Judge, in the matter of Broward County School Board vs. Brenda Joyce Fischer, Case No. 19-1928TTS, before the State of Florida Division of Administrative Hearings.

SUMMARY EXPLANATION AND BACKGROUND:

See Supporting Docs for Summary Explanation and Background.

SCHOOL BOARD GOALS:

◉ Goal 1: High Quality Instruction ◉ Goal 2: Safe & Supportive Environment ○ Goal 3: Effective Communication

FINANCIAL IMPACT:

There is no financial impact to the School District.

EXHIBITS: (List)

(1) Summary Explanation and Background (2) Proposed Final Order

BOARD ACTION:

APPROVED

(For Official School Board Records Office Only)

SOURCE OF ADDITIONAL INFORMATION:

Name: Douglas G. Griffin	Phone: 7543212050
Name:	Phone: 7543212050

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

Senior Leader & Title: Jeffrey S. Moquin - Chief of Staff

Signature: *Jeffrey S. Moquin*
4/7/2020, 2:29:02 PM
Electronic Signature

Approved In Open Board Meeting On: APR 2 1 2020

By: School Board Chair

Form #4189 Revised 07/25/2019
RWR/ JSM/DGG:asj

SUMMARY EXPLANATION AND BACKGROUND

On or about August 23, 2018, BRENDA JOYCE FISCHER (hereinafter "FISCHER") showed a video to her first and second period art/photography classes containing inappropriate nude images. FISCHER, by her own admission, had previewed the video before she played it for her first and second period classes. FISCHER showed students in her first period photography class, a video containing images of a topless female holding the genitals of a male who was naked from the waist down. In addition, the video that FISCHER showed to students in her first period photography class contained images of a male kneeling and appearing to stare into the naked genitals of a female standing in front him. The video FISCHER showed students in her first period photography class also contained other images, which are inappropriate for display in a high school class. After showing the images to her first period class, FISCHER showed the same images again to her second period photography class.

This recommendation is part of progressive discipline. On September 1, 2009, in addition to other corrective actions outlined in the Administrative Complaint, FISCHER received a three (3) day suspension for her use of inappropriate language.

The Administrative Complaint was served on FISCHER and she timely requested a hearing. Subsequent to the School Board's action, the matter was transferred to the Division of Administrative Hearings (hereinafter "DOAH") to assign an Administrative Law Judge (hereinafter "ALJ") to conduct the final hearing challenging the School Board's discipline.

On January 21, 2020, the ALJ entered a Recommended Order to suspend FISCHER from her employment as a teacher for three (3) days, without pay.

The Assistant General Counsel recommends that the School Board adopt the Recommended Order. The School Board's decision is final.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

DOAH CASE No.: 19-1928TTS

vs.

RSBM Agenda: 04-21-20 -I-2

BRENDA JOYCE FISCHER,

Respondent.
_____/

FINAL ORDER

THIS CAUSE came before THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA (hereafter referred to as "THE SCHOOL BOARD") at its meeting conducted on April 21, 2020, to consider the Recommended Order entered on January 21, 2020, by Cathy M. Sellers, Administrative Law Judge (ALJ) of the State of Florida Division of Administrative Hearings.

IT IS THEREUPON ADJUDGED that:

1. No party filed exceptions.

2. The SCHOOL BOARD adopts the Recommended Order in its entirety, which is incorporated herein by reference (see Recommended Order attached hereto as Exhibit "A").

3. The SCHOOL BOARD hereby suspends Respondent, BRENDA JOYCE FISCHER from her employment as a teacher for three (3) days, without pay.

DONE AND ORDERED in Fort Lauderdale, Broward County, Florida, this 30th day of April, 2020.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

By _____
DONNA P. KORN, CHAIR

Filed in Official School Board Records the 30th day of APRIL 2020.

_____
Supervisor, Official School Board Records

Copies Furnished to:

DENISE MARIE HEEKIN, ESQUIRE
Bryant Miller Olive, P.A.
One Southeast Third Avenue, Suite 2200
Miami, Florida 33131

DOUGLAS G. GRIFFIN, ESQUIRE
Broward County School Board
Eleventh Floor
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301

ROBERT F. MCKEE, ESQUIRE
Robert F. McKee, P.A.
1718 East Seventh Avenue, Suite 301
Tampa, Florida 33605

ROBERT W. RUNCIE, Superintendent of Schools
Office of the Superintendent
The School Board of Broward County, Florida
600 Southeast Third Avenue - 10th Floor
Fort Lauderdale, Florida 33301

STATE OF FLORIDA, DIVISION OF ADMINISTRATIVE HEARINGS
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

APPEAL OF FINAL ORDER

Pursuant to Section 120.68, Florida Statutes, a party to this proceeding may seek judicial review of this Final Order in the appropriate district court of appeal by filing a notice of appeal with Noemi Gutierrez, Agency Clerk, Official School Board Records, The School Board of Broward County, Florida, 600 Southeast Third Avenue – 2nd Floor, Fort Lauderdale, Florida 33301, on or before thirty (30) days from the date of this Final Order. A copy of the notice and a copy of this Final Order, together with the appropriate filing fee, must also be filed with the Clerk, Fourth District Court of Appeal, 110 South Tamarind Avenue, West Palm Beach, Florida 33401. If you fail to file your notice of appeal within the time prescribed by laws and the rules of court, you will lose your right to appeal this Final Order.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 19-1928TTS

BRENDA JOYCE FISCHER,

Respondent.
_____/

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019),[1/] before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on October 7, 2019, in Pompano Beach, Florida.

APPEARANCES

For Petitioner: Elizabeth W. Neiberger, Esquire
Bryant Miller Olive, P.A.
One Southeast Third Avenue, Suite 2200
Miami, Florida 33131

For Respondent: Robert F. McKee, Esquire
Robert F. McKee, P.A.
Post Office Box 75638
Tampa, Florida 33605

STATEMENT OF THE ISSUE

The issue in this case is whether just cause exists for Petitioner, Broward County School Board, to suspend Respondent,

Exibit "A"

Brenda Joyce Fischer, from her employment as a teacher for three days without pay.

PRELIMINARY STATEMENT

On or about March 19, 2019, Petitioner served an Administrative Complaint on Respondent, notifying her that the Superintendent of Broward County Schools was recommending that Petitioner take action to suspend her for three days without pay, and setting forth the factual and legal grounds for that proposed action. On April 9, 2019, Petitioner approved the Superintendent's recommendation to suspend Respondent for three days without pay. Respondent timely requested an administrative hearing challenging the proposed action, and the matter was referred to DOAH for assignment of an ALJ to conduct a hearing pursuant to sections 120.569 and 120.57(1).

The final hearing initially was scheduled for July 30 and 31, 2019, but, at Petitioner's request, was rescheduled for October 7 and 8, 2019. The final hearing was held on October 7, 2019.

Petitioner presented the testimony of Jimmy Arrojo; Derek Gordon; students T.P., D.M., A.P., A.F., J.B., and I.T. Petitioner's Exhibits 1 through 12, 14 through 17, 21, 22, and 24 through 30 were admitted into evidence without objection. Petitioner's Exhibit 13 was admitted into evidence over

objection. Respondent testified on her own behalf and did not tender any exhibits for admission into evidence.

The one-volume Transcript of the final hearing was filed at DOAH on October 25, 2019. The deadline for filing proposed recommended orders initially was set for November 4, 2019, but at Petitioner's request, was first extended to November 25, 2019, and then to December 11, 2019. The parties timely filed their Proposed Recommended Orders on December 11, 2019. Both Proposed Recommended Orders have been duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner, Broward County School Board, is charged with the duty to operate, control, and supervise free public schools in Broward County pursuant to article IX, section 4(b) of the Florida Constitution and section 1012.33, Florida Statutes.[2/]

2. Respondent has been employed as a teacher with Petitioner since 1992, and has been employed as an art teacher at Western High School ("Western") since 2009.

II. Evidence Adduced at the Final Hearing

3. During the 2018-2019 school year, Respondent was assigned to teach Creative Photography I, an elective course, at Western. The 2018-2019 school year was the first year this course was taught at Western.

4. In May 2018, Respondent requested that textbooks be ordered for the Creative Photography I course. As of the first few weeks of the 2018–2019 school year, the textbooks for the course had not yet arrived. Respondent testified, credibly, that she did not have access to any textbooks from which to plan her instruction during the time she was waiting on the arrival of the textbooks.

5. During the planning period before the first week of school, Respondent contacted photography teachers at other schools in the Broward County Public School District ("District") to obtain materials to use until her textbooks arrived. For a variety of reasons, much of the material she received from other teachers was not suitable for her course.

6. According to Respondent, Christine Malin, who taught a photography course at another public high school in the District, assisted her by providing materials. Much of what Malin provided was not suitable because Respondent's class did not have access to cameras for student use.

7. Malin also told Respondent about two videos on photography that she had found on the internet, and that Malin's description of the content of the videos sounded suitable for Respondent's course. Respondent testified that Malin told her that she had reviewed the videos. However, when asked whether Malin told her the videos were appropriate to show to a high

school class, Respondent acknowledged that "[s]he didn't say anything about that."

8. Respondent previewed one video in its entirety. She testified that "when it came to the second one, I did not preview it as closely as I did the first one because the first one I said, okay, this isn't bad." According to Respondent, she previewed the second video after school in the evening while she was working on school paperwork. She testified "[s]o I was doing that along with listening to the video and watching the video and I was doing some other stuff."

9. Respondent showed the videos to her first period class on August 23, 2018. One of the videos contained a total of 11 images of nude men and women on seven slides. Two of the images, shown twice during the video, depicted the models in sexually suggestive poses with their genitalia clearly visible. One of the six images depicted a nude male, which, while not depicting genitalia, was accompanied by an audio narrative referencing a dominant sexual partner.

10. The first nude images were shown in the interval from 3:02 to 3:13 in the video. Additional nude, sexually explicit images appeared in the interval from 3:14 to 3:21 and 3:21 to 3:36 in the video. All of these images were again shown in the interval from 3:36 to 3:43 in the video. The last nude images appeared in the interval from 5:08 to 6:25 in the video,

accompanied by the sexually explicit narrative. The images comprised approximately two minutes of the nearly 13-minute long video.

11. Respondent testified that she did not realize that the video contained nude images until she saw the first nude image, at which point she tried to turn the projector off. According to Respondent, she was "fumbling," but did eventually stop the projection of the nude images, albeit not before the students saw the additional nude images.

12. Respondent also showed the video to her second period class. According to Respondent, as soon as she saw the first nude image, she shut the projector lens off and fast-forwarded past the other images, so that the students only saw one nude image.

13. According to Respondent, she was able to use the portions of the video that did not contain nude images for instructional purposes in her first and second period classes.

14. Six students in Respondent's class testified about what they saw in the video shown in Respondent's class that day. The students who testified were 15- and 16-years-old at the time of the incident. All six students who testified also had provided handwritten statements to Western assistant principal Derek Gordon as part of Petitioner's investigation into the incident.

15. Four of the six students who testified were in Respondent's first period class. They each testified to the effect that they had viewed all of the nude images in the video. Some of these students, either in testimony or in their written statements, characterized the images as "inappropriate" or "disturbing."

16. Two of the students who testified were in Respondent's second period class. They testified to the effect that they had seen more than one nude image and had heard sexually explicit audio narrative accompanying the last nude image in the video. One of these students, in a written statement provided during the investigation, characterized the images as "inappropriate."

17. Respondent acknowledged that she did not obtain prior approval from the principal of Western or his designee, her department head, before showing the video to her class.

18. She also acknowledged that she had previewed the video only three days, at most, before she showed it to her classes, and that she had not watched the entire video because she was multitasking.

19. When questioned about when she prepared her lesson plan for August 23, 2018, she responded: "I wound up doing it that Monday, Tuesday, Wednesday because I was told I was getting my textbooks, they didn't come in and I know I needed an assignment.

. . . I didn't plan for two weeks because I was expecting to get the textbooks in so we could use the textbooks."

20. She acknowledged that it was her responsibility to thoroughly preview the video before she showed it to the students, and that she had not vetted it to the extent she should have before she showed it in her classes.

21. After her second period class on August 23, 2018, Respondent reported to Derek Gordon that she had shown a video containing nude images in her first and second period classes.

22. Gordon initiated the investigation that culminated in Petitioner proposing to suspend Respondent for three days without pay. Respondent's timely challenge to that proposed action is the subject of this proceeding.

23. According to Gordon and Western Principal Jimmy Arrojo, many parents contacted the school regarding the incident, some of whom wanted their children removed from Respondent's class. Arrojo testified that the incident also was widely reported in the news.

24. Following this incident, and apart from serving her three-day suspension, Respondent taught the Creative Photography I course at Western for the remainder of the 2018-2019 school year.

25. Respondent currently is serving as a teacher facilitator for an online class at Western. She is not teaching

the Creative Photography I course at Western for the 2019–2020 school year.

School Board Policy and Faculty Handbook Requirements

26. Petitioner and the administration at Western each have adopted relevant standards and requirements governing the use of audiovisual materials in classroom instruction.

27. Specifically, school board policy 6100, titled "Audiovisual Materials Use Policy," requires audiovisual materials to be previewed "in their entirety" before being shown to students by the teacher using the material to ensure that the language, theme, level of violence, and content are consistent with the maturity level of the students who will be viewing the material.

28. The policy adopts the Motion Picture Association of America's ("MPAA") ratings as the guidance standards for determining whether audiovisual materials are age-appropriate. The MPAA rating rule for the PG–13 category states, in pertinent part: "[m]ore than brief nudity will require at least a PG–13 rating, but such nudity in a PG–13 rated motion picture generally will not be sexually oriented." By contrast, the MPAA rating rule for R–17 states, in pertinent part: [a]n R–rated motion picture may contain adult themes, adult activity, . . . sexually–oriented nudity, or . . . other elements, so that parents are counseled to take this rating very seriously.

Children under 17 are not allowed to attend R-rated motion pictures unaccompanied by a parent or adult guardian."

29. Additionally, the Western High School Faculty & Staff Handbook for the 2018-2019 school year ("Faculty Handbook") includes several provisions relevant to the charges at issue in this proceeding.

30. Specifically, the section of the Faculty Handbook titled "Movies" states, in pertinent part, that "[a]ll instructional resources, including audiovisual materials, must: be consistent with School Board of Broward County policies[,] [and] [r]eflect the best teaching practices based on age-appropriateness and instructional relevance, meant to support instruction[,] not replace it." Additionally, the Faculty Handbook requires faculty who intend to use audiovisual materials for class instruction to "[c]omplete a Movie Request Form of corresponding assignment [and] [s]ubmit Request Form to department chair for approval."

31. The Faculty Handbook also states that each teacher is required to keep his/her lesson plans one week in advance, and specifies the components that each lesson plan must contain. The purpose of this requirement is to ensure that each lesson is prepared a sufficient time in advance so that classroom instruction is organized and effective. The Faculty Handbook does not contain, and Arrojo confirmed the absence of, an

exemption to the lesson plan preparation requirement for situations when a textbook on order has not arrived by the time the course begins.

32. To this point, the Florida Department of Education has ratified the Curriculum Planning and Learning Management System ("CPALMS"), which is the "State of Florida's official source for standards information and course descriptions." CPALMS provides "an online toolbox of information, vetted resources, and interactive tools to help educators effectively implement teaching standards." As Arrojo explained, CPALMS is the "go-to site" for every course that is offered. For the Creative Photography I course, there are 460 vetted and approved course-specific resources that are available to teachers on the CPALMS website for use as instructional material.[3/]

Respondent's History of Prior Discipline

33. Respondent previously has been subjected to disciplinary action while employed by Petitioner.

34. Specifically, Respondent's disciplinary history consists of the following: a written reprimand in February 1997 for using inappropriate language in class; a written reprimand in April 1997 for making inappropriate comments in class; a three-day suspension in 2009 for using inappropriate language in class; a verbal reprimand in 2014 for intentionally exposing a student to unnecessary embarrassment and disparagement; a written

reprimand in November 2017 for inappropriately touching and yelling at students; and a written reprimand issued by the State of Florida Education Practices Commission in October 2018 for failure to make reasonable effort to protect a student from conditions harmful to learning and/or the student's mental and/or physical health and safety.

III. Findings of Ultimate Fact

35. As discussed in greater detail below, Respondent has been charged in this case with misconduct in office, incompetency, and willful neglect of duty under Florida Administrative Code Rule 6A-5.056, and with violating Broward County School Board policies 6100 and 4008.[4/]

36. Whether a charged offense constitutes a violation of applicable rules and policies is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995)(whether particular conduct constitutes a violation of a statute, rule, or policy is a factual question); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995)(whether the conduct, as found, constitutes a violation of statutes, rules, and policies is a question of ultimate fact); Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1st DCA 1985)(whether there was a deviation from the standard of conduct is not a conclusion of law, but is instead an ultimate fact).

Misconduct in Office under Rule 6A-5.056(2)

37. Based on the foregoing findings, it is found, as a matter of ultimate fact, that Respondent engaged in conduct constituting misconduct in office, as defined in rule 6A-5.056.

38. Respondent's conduct violated several provisions of Florida Administrative Code Rule 6A-10.081, the Principles of Professional Conduct for the Education Profession in Florida, which has been incorporated into rule 6A-5.056(2).

39. Specifically, in failing to adequately prepare her lesson plans a week in advance and failing to preview the video in its entirety, Respondent failed to exercise best professional judgment, as required by rule 6A-10.081(1)(b).

40. As a result of her failure to exercise best professional judgment, she exposed the 15- and 16-year-old students in her classes to images that they found "inappropriate" and "disturbing." In doing so, she failed to make a reasonable effort to protect her students from conditions harmful to learning and their mental health, in violation of rule 6A-10.081(2)(a)1.

41. Furthermore, even after Respondent became aware during her first period class that the video contained nudity and sexually explicit images, she nonetheless continued to show it, thereby exposing the students to additional nude, sexually explicit images and narrative that they otherwise would not have

seen or heard. In doing so, she intentionally exposed the students in her first period class to unnecessary embarrassment, in violation of rule 6A-10.081(2)(a)5.

42. Respondent's failure to exercise best professional judgment was further compounded when, after learning of the images and narrative, she nonetheless chose to show the video to her second period class. Although she testified that she skipped over almost all of the nude content, the students' testimony established that, at minimum, they were exposed to the first two nude images at 3:02 in the video and the last image, with its sexually explicit narrative, starting at 5:08 in the video. In choosing to show the video despite being aware of its contents, Respondent intentionally exposed the students in her second period class to unnecessary embarrassment, in violation of rule 6A-10.081(2)(a)5.

43. Respondent's conduct also negatively affected the confidence and respect of her students' parents, in violation of rule 6A-10.081(1)(c), which establishes a standard to achieve and sustain the highest degree of ethical conduct. To this point, Arrojo and Gordon both testified, credibly, that they had received numerous calls from parents, requesting that their children be removed from Respondent's class.

44. For the reasons discussed below, it is also found, as a matter of ultimate fact, that Respondent engaged in conduct that

violated school board policies 6100 and 4008; thus, she violated rule 6A-5.056(2)(c).

45. For the reasons discussed in detail above, it is found, as a matter of ultimate fact, that Respondent engaged in conduct that disrupted her students' learning environment, in violation of rule 6A-5.056(2)(d).

46. Respondent's conduct also reduced her ability to effectively perform her teaching duties, in violation of rule 6A-5.056(2)(e). Specifically, as a result of Respondent's conduct, many parents requested to have their children removed from her class. This significant consequence evidences that Respondent's ability to effectively perform her teaching duties was reduced during the 2018-2019 school year.

Incompetency under Rule 6A-5.056(3)

47. It is also found, as a matter of ultimate fact, that Respondent's conduct constitutes incompetency due to inefficiency, in violation of rule 6A-5.056(3)(a). Specifically, in showing the video to her classes, Respondent violated school board policies and State Board of Education rules, and, thus, failed to perform her teaching duties as prescribed by law. By showing the video containing content that was not appropriate for her students to see and hear, she also failed to communicate appropriately with her students. Further, as a direct result of her disorganization in failing to adequately and timely prepare

her lesson plans for August 23, 2018, including completely previewing both videos that she intended to show that day, the welfare of her students was diminished.

48. The undersigned finds, as a matter of ultimate fact, that Respondent's conduct does not constitute incompetency due to incapacity. Although Respondent was not adequately prepared for her August 23, 2018, class, and, as a result, showed a video that was age-inappropriate for her students, the evidence does not establish that she lacked adequate command of her area of specialization. To the contrary, the evidence establishes that she taught the Creative Photography I course for the entire 2018-2019 school year, and that, apart from her three-day suspension, incurred no further disciplinary action due to lack of preparation or use of inappropriate instructional materials.

Willful Neglect of Duty under Rule 6A-5.056(5)

49. It is found, as a matter of ultimate fact, that Respondent's conduct constitutes willful neglect of duty, in violation of rule 6A-5.056(5). As discussed above, once Respondent became aware, during her first period class, of the nude and sexually explicit images in the video, she nonetheless chose to continue showing the video to her first period class, thereby recklessly[5/] exposing the students to additional nude images and sexually explicit content.

Violation of School Board Policy 6100

50. It is found, as a matter of ultimate fact, that Respondent's conduct violated school board policy 6100.

51. Specifically, by showing the video in her classes, Respondent violated policies 6100(1)(d) and (2)(a), which require that audiovisual materials selected for student instruction be age-appropriate. The evidence definitively establishes that the nude and sexually explicit images and narrative were not age-appropriate for the students enrolled in the class. The students who testified at the final hearing were 15- and 16-years-old. Pursuant to the MPAA ratings, which have been incorporated into school board policy 6100, audiovisual materials depicting sexually-oriented nudity—such as that depicted in multiple images in the video—would warrant an R-rating, indicating that they are inappropriate for viewing by children younger than 17 years old.

52. Respondent's conduct also violated policy 6100(2)(b). She did not personally preview the video depicting the nude images that she showed in her class on August 23, 2018, and the video was neither part of Western's school audiovisual collection nor reviewed or recommended in professional literature.

53. Additionally, Respondent's conduct violated policy 6100(3)(a), because she did not obtain prior approval from Arrojo

or her department head before showing the video containing the nude images to her classes.

54. Respondent's conduct also violated policy 6100(3)(c), because she did not preview, in its entirety, the video containing the nude images before she showed it to her students. Consequently, she did not pay due attention to assure that content was consistent with the maturity level of the students in her class.

Violation of School Board Policy 4008

55. It is found, as a matter of ultimate fact, that Respondent's conduct violated school board policy 4008.

56. Specifically, as discussed above, Respondent's conduct violated several provisions of rule 6A-10.081, and, thus, violated policy 4008(B)(1).

57. Respondent also violated policy 4008(B)(1) by failing to effectively use the materials provided by the District or State in her class instruction on August 23, 2018. Although she could have chosen from the 460 units of material available on the CPALMS website—all of which were State-approved for use in Creative Photography I—she instead chose to show a video that that she had not previewed, that was not part of Western's audiovisual collection, and that had not been approved for instructional use by Arrojo or his designee. In doing so, she failed to employ sound teaching practices and methods.

58. Respondent violated the directive in policy 4008(B)(3) to infuse responsibility in the classroom, by failing to adequately prepare for her class, and, consequently, showing nude, sexually explicit images that were inappropriate for her students to view.

59. Because it is determined that Respondent violated provisions of rules 6A-5.056 and 6A-10.081, and school board policy 6100, it is found that she also violated school board policy 4008(B)(8).

CONCLUSIONS OF LAW

60. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding. §§ 120.569, 120.57(1), Fla. Stat.

61. This is a disciplinary proceeding in which Petitioner seeks to suspend Respondent from her employment as a teacher for three days, without pay.

62. Respondent is an "instructional employee," as defined in section 1012.01(2).

63. Section 1012.33(6)(a) states, in pertinent part, that "any member of the instructional staff may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a)." "Just cause" is "cause that is legally sufficient." Fla. Admin. Code R. 6A-5.056. Pursuant to section 1012.33(1)(a), just cause includes misconduct in office, incompetency, and willful neglect of duty.

64. To suspend Respondent from her employment as a teacher, Petitioner must prove that she committed the alleged conduct; that the conduct violates the rules and policies cited in the Administrative Complaint and/or stipulated in the pre-hearing stipulation; and that the violation of these rules and policies constitutes just cause to suspend her.

65. The standard of proof applicable to this proceeding is a preponderance, or greater weight, of the evidence. McNeil v. Pinellas Cty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cty., 569 So. 2d 883 (Fla. 3d DCA 1990).

66. Petitioner has charged Respondent with misconduct in office. In pertinent part, rule 6A-5.056(2), defines misconduct in office as:

* * *

> (b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.[6];
>
> (c) A violation of the adopted school board rules;
>
> (d) Behavior that disrupts the student's learning environment; or
>
> (e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

67. Based on the foregoing Findings of Fact, it is concluded that Respondent committed misconduct in office, pursuant to rule 6A-5.056(2).

68. Petitioner also charged Respondent with incompetency under rule 6A-5.056(3). "Incompetency" is defined as "the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity."

69. "Inefficiency" is defined, in pertinent part, in rule 6A-5.056(3)(a) to mean one or more of the following: "1. [f]ailure to perform duties prescribed by law; 2. [f]ailure to communicate appropriately with and relate to students; . . . 4. [d]isorganization of his or her classroom to such an extent that the health, safety or welfare of the students is diminished[.]"

70. Based on the foregoing Findings of Fact, it is concluded that Respondent's conduct constituted incompetency due to inefficiency, pursuant to rule 6A-5.056(3)(a).

71. "Incapacity" is defined in rule 6A-5.056(3)(b) as constituting one or more of the following: "1. Lack of emotional stability; 2. Lack of adequate physical ability; 3. Lack of general educational background; or 4. Lack of adequate command of his or her area of specialization."

72. Based on the foregoing Findings of Fact, it is concluded that Respondent's conduct did not constitute incompetency due to incapacity.

73. Petitioner also charged Respondent with "willful neglect of duty," which, pursuant to rule 6A-5.056(5), means "intentional or reckless failure to carry out required duties."

74. Based on the foregoing Findings of Fact, it is concluded that Respondent engaged in willful neglect of duty, in violation of rule 6A-5.056(5).

75. Petitioner also charged Respondent with violating policy 6100, Petitioner's audiovisual materials use policy. This policy states, in pertinent part:

> 1. Requirements
>
> All instructional resources, including audiovisual materials, must:
>
> * * *
>
> d. reflect the best teaching practices based on age appropriateness and instructional relevance.
>
> 2. Selection of Audiovisual Materials
>
> a. Audiovisual materials selected for student instruction and classroom use must be age appropriate and relevant to the specific instructional goal. When available, the MPAA (Motion Picture Association of America) ratings should be used to guide decisions about audience appropriateness.
>
> b. Audiovisual materials in the school collection and those selected for use from

outside the school collection must be selected based on personal preview, reviews or recommendations from professional literature, or have been recommended for use by the District.

3. Procedures and Best Practices for Use of Audiovisual Materials

The usage of audiovisual materials from inside or outside the school collection must:

a. meet principal or designee approval prior to use with students;

* * *

c. be previewed in their entirety prior to being shown to students by the teacher using the resource, with special attention paid to assuring that language, theme, violence, and content are consistent with the maturity level of the students who will be viewing the material[.]

76. Based on the foregoing Findings of Fact, it is concluded that Respondent violated school board policy 6100.

77. Petitioner also charged Respondent with violating School Board Policy 4008. This policy states, in pertinent part:

Responsibilities and Duties (Principals and Instructional Personnel)

* * *

B. Duties of Instructional Personnel

The members of instructional staff shall perform the following functions:

1. Comply with the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida.

> 2. Teach efficiently and effectively using the books and materials required by the District or the State following the prescribed courses of study and employ sound teaching practices and methods.
>
> 3. Infuse in the classroom, the District's adopted Character Education Traits of Respect, Honesty, Kindness, Self-control, Tolerance, Cooperation, Responsibility and Citizenship.
>
> * * *
>
> 8. Conform to all rules and regulations that may be prescribed by the State Board and by the School Board.

78. Based on the foregoing Findings of Fact, it is concluded that Respondent violated school board policy 4008.

79. School board policy 4.9, titled "Corrective Action," prescribes the types of discipline appropriate to be imposed for specified offenses.

80. Policy 4.9, section (I)(d), establishes Petitioner's progressive discipline policy. That provision states, in pertinent part, that "[i]n most cases, the District follows a progressive corrective action process consistent with the "Just Cause" standard designed to give employees the opportunity to correct the undesirable performance, [or] conduct . . .. A more severe corrective measure will be used when there is evidence that students . . . was (sic) negatively impacted."

81. Policy 4.9, section II, establishes the range of disciplinary outcomes for specified offenses. Under this

section, the following are identified as "Category B offenses,"[6/] for which the recommended range of discipline is "Reprimand/ Dismissal": "m) [a]ny violation of the Code of Ethics of the Education Professional in the State of Rule—State Board of Education Administrative Rule; . . . r)[f]ailure to comply with School Board policy, state law, or appropriate contractual agreements."

82. Policy 4.9, section III(c), titled "Other Considerations," sets forth the circumstances that may be considered in determining the appropriate penalty within a Category B offense range. These circumstances include, but are not limited to:

1. The severity of the offense

2. Degree of student involvement

3. Impact on students, educational process and/or community

4. The number of repetitions of the offenses and length of time between offenses

5. The length of time since the misconduct

6. Employment history

7. The actual damage, physical or otherwise, caused by the misconduct

8. The deterrent effect of the discipline imposed

9. Any effort of rehabilitation by the employee

10. The actual knowledge of the employee pertaining to the misconduct

11. Attempts by the employee to correct or stop the misconduct

12. Related misconduct by the employee in other employment including findings of guilt or innocence, discipline imposed and discipline served

13. Actual negligence of the employee pertaining to any misconduct

14. Pecuniary benefit or self-gain to the employee realized by the misconduct

15. Degree of physical and mental harm to a student, co-worker or member of the public

16. Length of employment

17. Whether the misconduct was motivated by unlawful discrimination

18. Any relevant mitigating or aggravating factors under the circumstance

19. Employee's evaluation

20. Adherence to Self-Reporting Policy

83. Here, the factors warranting a three-day suspension of Respondent include: the severity of the offenses; the impact of Respondent's conduct on students, the education process, and the community; Respondent's prior disciplinary history; the need to deter future similar conduct; Respondent's failure to take adequate action to correct the violation after becoming aware that the video contained inappropriate conduct; and her decision to show the video a second time while knowing that the video

contained age-inappropriate content. Although Respondent did self-report her offense, she did so only after she had twice shown it to her classes, even while knowing of its inappropriate content.

84. Based on the foregoing, it is determined that just cause exists, as required by section 1012.33(1)(a) and (6), to suspend Respondent from her employment as a teacher for three days, without pay.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Broward County School Board, enter a final order determining that just cause exists to suspend Respondent, Brenda Joyce Fischer, from her employment as a teacher for three days, without pay.

DONE AND ENTERED this 21st day of January, 2020, in Tallahassee, Leon County, Florida.

CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of January, 2020.

ENDNOTES

[1/] All references to sections 120.569 and 120.57 are to the 2019 version of Florida Statutes.

[2/] All references to chapter 1012, Florida Statutes, are to the 2018 version, which was in effect at the time of Respondent's conduct that is alleged to have violated specified statutes, rules, and policies in this case.

[3/] Arrojo testified that the textbook Respondent selected for the Creative Photography I course also was used at another school in the Broward County School District, so was available to be borrowed on a single copy basis for Respondent's use while waiting for the arrival of the class set of books. This practice is not mentioned in the Faculty Handbook and the evidence does not show that this practice has been formally adopted as a school board policy.

[4/] The rules and policies about which these findings of ultimate fact are made are set forth in pertinent part in the Conclusions of Law.

[5/] The term "recklessly" is not defined in chapter 1012 or implementing rules. Black's Law Dictionary defines "reckless" as "characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious . . . disregard for or indifference to that risk." Black's Law Dictionary (Deluxe Seventh Ed. 1999).

[6/] Rule 6A-10.081, which is incorporated into rule 6A-5.065(2), states, in pertinent part:

> (1) Florida educators shall be guided by the following ethical principles:
>
> * * *
>
> (b) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore

strive for professional growth and will seek to exercise the best professional judgment and integrity.

(c) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

(2) Florida educators shall comply with the following disciplinary principles. Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

(a) Obligation to the student requires that the individual:

1. Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

* * *

5. Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

[7/] Category B offenses are "considered to be so egregious, problematic, or harmful that the employee may be immediately removed from the workplace until such time a workplace investigation is completed." Policy 4.9, § I(d). Consideration of the severity of the misconduct in each case, together with pertinent relevant circumstances in section III(c), determine what step in the range of progressive corrective action is followed. Id.

COPIES FURNISHED:

Katherine A. Heffner, Esquire
Robert F. McKee, P.A.
Post Office Box 75638
Tampa, Florida 33605
(eServed)

Denise Marie Heekin, Esquire
Bryant Miller Olive, P.A.
Suite 2200
One Southeast Third Avenue
Miami, Florida 33131
(eServed)

Ranjiv Sondhi, Esquire
Bryant Miller Olive, P.A.
Suite 2200
One Southeast Third Avenue
Miami, Florida 33131
(eServed)

Elizabeth W. Neiberger, Esquire
Bryant Miller Olive, P.A.
Suite 2200
One Southeast Third Avenue
Miami, Florida 33131
(eServed)

Robert F. McKee, Esquire
Robert F. McKee, P.A.
Post Office Box 75638
Tampa, Florida 33675
(eServed)

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Robert W. Runcie, Superintendent
Broward County School Board
600 Southeast Third Avenue, Tenth Floor
Fort Lauderdale, Florida 33301-3125

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.