AGENDA REQUEST FORM

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

ITEM No.: II-3.

MEETING DATE	2020-04-21 10:00 - Regular School Board Meeting
AGENDA ITEM	ITEMS
CATEGORY	II. 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 -2

REQUESTED ACTION:

Approve the Final Order adopting the Recommended Order entered on January 29, 2020, by John G. Van Laningham, Administrative Law Judge, in the matter of Broward County School Board vs. Brenda Joyce Fischer, Case No. 19-4175TTS, 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 a 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:

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

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

Signature: *Jeffrey S. Moquin*
4/7/2020, 2:32:17 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

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

BRENDA JOYCE FISCHER,

Respondent.
_____/

DOAH CASE No.: 19-4175TTS

RSBM Agenda: 04-21-20 -II-3

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 29, 2020, by John G. Van Laningham, 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 exonerates Respondent, BRENDA JOYCE FISCHER of all charges brought against her and awards FISCHER back salary as required under Section 1012.33(6)(a).

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

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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.

A STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 19-4175TTS

BRENDA JOYCE FISCHER,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham, Division of Administrative Hearings ("DOAH"), for final hearing by video teleconference on November 14, 2019, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Elizabeth W. Neiberger, Esquire
Bryant Miller Olive, P.A.
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For Respondent: Robert F. McKee, Esquire
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STATEMENT OF THE ISSUE

The issue is whether just cause exists for Petitioner to suspend Respondent from her teaching position for five days, without pay, based upon Respondent's interactions with students

Exhibit "A"

in a photography class she taught during the 2018-2019 school year.

PRELIMINARY STATEMENT

On June 12, 2019, Petitioner Broward County School Board issued an Administrative Complaint against Respondent Brenda Joyce Fischer, alleging that, while teaching the preceding school year, Ms. Fischer had made an insensitive remark about Latinos to a student named M.G. during her first-period photography class at Western High School and, at other times, had yelled at some students in that same class. At its regularly scheduled meeting on July 23, 2019, Petitioner adopted the recommendation of its superintendent that Ms. Fischer be suspended from her teaching position for five days, without pay, based upon these allegations.

Ms. Fischer timely requested a formal administrative hearing to contest Petitioner's intended action. On August 6, 2019, Petitioner referred the matter to DOAH for further proceedings. Upon assignment, the undersigned set the final hearing for September 24 and 25, 2019. A Joint Motion to Continue Final Hearing was later granted, which postponed the hearing for a couple of months.

By Order dated November 13, 2019, the undersigned granted Petitioner's motion for leave to amend the administrative

complaint, to add allegations that Ms. Fischer had mistreated C.C., another photography student.

At the final hearing, which took place on November 14, 2019, Petitioner called the following witnesses: Derek Gordon, an assistant principal at Western High School; Christine Graf, an assistant principal at Western High School; Julia Munoz, a school counselor at Western High School; a former Western High School student, M.C.; and two current Western High School students, M.G. and C.C. Petitioner's Exhibits 4 through 6 and 9 through 19 were received in evidence. Official recognition was taken of Petitioner's Exhibit 7 and of the file for DOAH Case No. 19-1928TTS. Ms. Fischer testified but did not offer any exhibits.

The final hearing transcript was filed on December 16, 2019. Each party timely filed a proposed recommended order ("PRO") on January 9, 2020, which was the deadline. The parties' PROs have been considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2019.

FINDINGS OF FACT

1. The Broward County School Board ("School Board" or the "district"), Petitioner in this case, is the constitutional

entity authorized to operate, control, and supervise the Broward County Public School System.

2. At all times relevant to this matter, Respondent Brenda Joyce Fischer ("Fischer"), was employed as an art teacher at Western High School, where she had been assigned since 2009. Fischer first became an employee of the district in 1992.

3. During the 2018-2019 school year, Fischer taught a photography class, which met during first period several days per week. The events at issue occurred in this first-period class in the early months of 2019.

4. The main incident took place on March 1, 2019, and involved a tenth-grade student named M.G., who—as she frequently did—arrived late that day to the 90-minute class, which started at 7:40 a.m. On this particular morning, M.G. walked in no earlier than 8:00 a.m. (her recollection) or as late as 8:20 a.m. (according to Fischer). Whether M.G. was 20 minutes or 40 minutes late, however, is immaterial. The important (and undisputed) fact is that M.G. was quite noticeably tardy, again.

5. Within minutes after her untimely arrival, M.G. showed Fischer a pass, which authorized M.G. to leave class early to attend a school-sponsored function. The student asked the teacher for permission to go. Fischer denied M.G.'s request because M.G. had not completed the day's assignment.

6. At some point, Fischer made the comment that gave rise to this proceeding, namely, that M.G. was operating on "Latin time" despite living in the United States (or words to this effect).[1/] Fischer's exact words have been lost to time, but the phrase "Latin time" was among them, and the gist of the remark was to suggest that M.G. was prone to running late, as Latin people are known to do (so the statement would have it).

7. M.G. claims that this remark offended her. After Fischer denied M.G.'s request to leave class for the special function, M.G. protested to Fischer about the perceived slight.[2/]

8. The undersigned credits Fischer's testimony that she did not intend to cause offense and, indeed, did not at the time regard the "Latin time" remark as a to-be-taken-seriously commentary on the unpunctuality (as the remark implies) of Latinos and Latinas. Rather, she thought it was a bon mot, something more light hearted or humorous than cutting or disparaging. Of course, as Fischer should have known, remarks of this nature, once commonplace, had by 2019 fallen into disfavor, and a culture of victimhood had arisen, which encouraged people to seek redress even for unintentional, de minimis offenses. Fischer should have known better than to utter a comment that was practically guaranteed to be called out as culturally insensitive, as indeed it is, to some degree.

There is no dispute that, despite her lack of bad intent, Fischer was in the wrong.

9. As it happened, though, M.G. was apparently less offended by the implied stereotype of Latin people as being chronically unpunctual, than by the application of the stereotype to a non-Latina such as herself. As M.G. informed Fischer when she complained about the remark, M.G.'s familial roots are in Spain, not Latin America, and thus, she identifies as European (Spanish), not Latin. This can be taken as an objection by M.G., not to the term "Latin time" per se, but to being lumped together with other Spanish speaking peoples, whose shared language, she maintains, should not be assumed to indicate similarities in other respects.[3/] The irony is that M.G.'s comment, therefore, was *itself* offensive, because her statement can reasonably be understood as an assertion that Spaniards, in general, are more punctual than Latinos.

10. The undersigned points this out, not to criticize or discredit M.G., but to illustrate that it is easy for a person innocently to make a statement which can be interpreted by another as offensive, particularly if the listener is primed to take offense. M.G. did not intend to insult Latinos by distinguishing herself from them, but her remark is, actually, somewhat insensitive in its implication, if taken at face value. It is interesting to note, as an aside, that none of the other

students took offense at M.G.'s comment. This might, in part, reflect the higher status conferred by victimhood at the hands of a teacher versus those of a student. But more likely, the indifference to M.G.'s seeming acceptance of the cultural stereotype suggests that no one present actually took the "Latin time" remark seriously as a true statement of Fischer's opinion about people of Latin descent. What the students recognized was that Fischer's ill-advised attempt at humor, which was doomed to failure because that joke isn't funny anymore (if it ever was), gave M.G. an opening, and that as soon as M.G. pounced, she had won the victim's unassailable virtue.

11. Fischer responded to M.G.'s objection appropriately, if predictably: she apologized, *twice* to M.G., and again to other students within earshot of her "Latin time" remark. M.G. rather ungraciously refused to accept Fischer's repeated apologies, accusing Fischer of being insincere about not having meant the remark to be interpreted "that way," i.e., as a mean spirited slur.[4/] Not content to let Fischer off the hook, M.G. appealed for help to the school administration, which did not hesitate to oblige. When she turned Fischer in for making the "Latin time" remark, M.G. also reported an unrelated incident involving another student, C.C., whom M.G. felt Fischer had mistreated; his story is told below. The district's disciplinary machine, its fuel having been ignited by the spark

of these accusations of prejudice, went to work, leading eventually to this hearing.

12. As regards C.C., the charges against Fischer are founded on allegations that she "yelled" at the student "aggressively" and "inappropriately." By way of background, at the time of his enrollment in Fischer's photography class, C.C. was attending school in the U.S. for the first time, having just recently emigrated from Venezuela. C.C. could not speak English when he arrived in this country.

13. C.C. used his cell phone in class as a translation tool, which everyone agrees is permissible. He also, however, frequently used his phone to communicate with others via text messages, which is generally not allowed, for obvious reasons. In fact, Fischer often observed C.C. surreptitiously texting during class when he should have been paying attention to the lesson or working on an assignment.

14. One morning, Fischer noticed that C.C. was texting instead of editing a photograph, which he was supposed to be doing. She walked up behind C.C. and, at close range in a loud voice, ordered him to get off the phone. Now, clearly, a teacher should not be subject to discipline for telling a student to stop goofing off in class. So what could Fischer have done wrong here? The district alleges that Fischer "yelled" at C.C. and contends that "yelling" constitutes a

disciplinable offense. In other words, it is not what Fischer said, but how she said it, which forms the basis of the alleged offense.

15. The fatal flaw in the district's theory is that there is no evidence of an objective standard by which to measure the relative ferocity of Fischer's vocalization. Instead, several students testified that Fischer "yelled," in their respective opinions, on this and other occasions. Fischer, for her part, acknowledged that she has a loud voice, but denied having yelled at C.C. Maybe each witness told the truth in this regard, as he or she sees it. One person's tolerance for loud sounds may differ from another's. If there is an objective standard for distinguishing "appropriate" from "inappropriate" volume levels for purposes of suspending or terminating a teacher for "yelling," however, it is certainly not established by the opinions of a few of the teacher's students.[5/] To be clear, there is no evidence suggesting that when Fischer "yelled" (as these students saw it), she was enraged, ranting, gesticulating wildly, or otherwise behaving in a manner that might indicate a potentially dangerous inability to control her emotions or actions.

16. When Fischer ordered C.C. to get off his phone, she startled him, causing the student to leave the classroom. C.C. immediately proceeded to the guidance counselor's office, to

report that Fischer's reprimanding him for unauthorized cell phone use had made him anxious and upset. The district makes much of C.C.'s emotional reaction, but it is hardly remarkable for a student to feel upset over being reprimanded. What's important here is that C.C. had not been *unjustly* reprimanded. His feelings, while understandable, are not persuasive proof of wrongdoing by Fischer.

17. The district also believes it is somehow relevant that C.C. was the subject of a Response to Intervention ("RTI") process due to his having been diagnosed with autism and ADHD in Venezuela. As a threshold matter, because Fischer taught an elective class and, hence, was not one of C.C.'s "core" teachers, it is unclear whether she knew much, if anything, about this RTI. In any event, there is no evidence that Fischer was provided any written instructions concerning accommodations that she was supposed to provide, which she thereafter failed to offer. If such documentation exists, it was not produced at hearing.

18. The few students who testified against Fischer accused her broadly of having given C.C. a hard time in class, insinuating (if not outright stating) that she did not care for C.C., specifically, because he struggled to keep up academically, nor for Spanish speaking students, in general. The evidence in this regard is nonspecific, undetailed, lacking

in context, and, in a word, thin. The proof is insufficient to support any findings of material fact.

Determinations of Ultimate Fact

19. The district has failed to prove, by a preponderance of the evidence, the charges brought against Fischer.

CONCLUSIONS OF LAW

20. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 1012.33(6)(a)2., 120.569, and 120.57(1), Florida Statutes.

21. A district school board employee against whom a disciplinary proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. Sch. Bd. of Dade Cty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J. concurring).

22. Once the school board, in its notice of specific charges, has delineated the offenses alleged to justify termination, those are the only grounds upon which dismissal may be predicated. See Lusskin v. Ag. for Health Care Admin., 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Dep't of

Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Dep't of Bus. & Prof'l Reg., 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991).

23. In an administrative proceeding to suspend or dismiss a member of the instructional staff, the school board, as the charging party, bears the burden of proving, by a preponderance of the evidence, each element of the charged offense(s). See McNeill v. Pinellas Cty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); MacMillan v. Nassau Cty. Sch. Bd., 629 So. 2d 226 (Fla. 1st DCA 1993).

24. As follows, section 1012.33(1)(a) defines, in relevant part, the term "just cause" for purposes of describing the grounds upon which a teacher's professional services contract may be terminated:

> 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, . . . gross insubordination, [or] willful neglect of duty.

25. In its Amended Administrative Complaint, the district alleges that Fischer is guilty of misconduct in office, as

defined in Florida Administrative Code Rule 6A-5.056(2); incompetency, as defined rule 6A-5.056(3)(a); gross insubordination, as defined in rule 6A-5.056(4); willful neglect of duty, as defined in rule 6A-5.056(5); violation of School Board Policy 4008; and violation of School Board Policy 4.9.

26. Whether Fischer committed any of the charged offenses is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

27. The State Board of Education has defined "misconduct in office" as meaning one of more of the following:

> (a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6A-10.080, F.A.C.;
> (b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;
> (c) A violation of the adopted school board rules;
> (d) Behavior that disrupts the student's learning environment; or
> (e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

Fla. Admin. Code R. 6A-5.056(2).

28. As the predicate acts for establishing misconduct in office, the district accused Fischer of having violated one or more of the following Principles of Professional Conduct:

> 1. [The educator s]hall 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. [The educator s]hall not intentionally expose a student to unnecessary embarrassment or disparagement.
>
> * * *
>
> 7. [The educator s]hall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

Fla. Admin. Code R. 6A-10.081(2)(a).

29. The district failed to carry its burden of proving that Fischer is guilty of misconduct in office. The only close question here is whether the bonehead "Latin time" remark is disciplinable. As found, Fischer's comment was clearly a faux pas. But was it mean spirited, racially motivated, or an expression of discriminatory animus? As a matter of fact, as found, Fischer did not intend the "Latin time" remark to be taken seriously as an ethnic slur. Her sincere apologies to M.G. and the other students should have sufficed to resolve the incident satisfactorily.

30. Further, the derogatory force of the "Latin time" remark, at least under the circumstances at issue, is simply not that strong. The undersigned cannot find that the comment in question is so offensive, on its face, that its mere utterance rises to the level of misconduct in office for purposes of establishing just cause for dismissal. The undersigned recommends, as well, that the district think long and hard about whether to base the suspension or termination of a teacher on a minor, unintentional transgression such as this. Doing so would signal that small offenses justify high outrage and serious consequences, thereby encouraging students to report on their teachers for ever more trivial infractions. This could cause classrooms to become arid environments presided over by cautious teachers who interact warily with their students, whose power as potential accusers, prudence would counsel, should remain constantly in the back of one's mind. The undersigned doubts that such fraught teacher-student relationships, within an atmosphere of distrust no less, would be conducive to learning.

31. The district likewise has not met its burden of proving that Fischer was guilty of "incompetency" through "inefficiency," which is defined, in relevant part, as meaning one or more of the following:

> 1. Failure to perform duties prescribed by law;

> 2. Failure to communicate appropriately with and relate to students; [or]
> 3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents.

Fla. Admin. Code R. 6A-5.056(3)(a). This charge failed as a matter of fact due to the insufficiency of the evidence.

32. The district failed to prove that Fischer committed "gross insubordination," defined in rule 6A-5.056(4) as "the intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority; misfeasance, or malfeasance as to involve failure in the performance of the required duties." The district contends that Fischer was directed not to scream at students, to treat all stakeholders with respect, to refrain from subjecting students to embarrassment and disparagement, and to promptly communicate with parents when students are struggling in her classes. The evidence, however, fails to establish that Fischer intentionally disobeyed a direct order by engaging in conduct that she knew had been specifically forbidden. Indeed, apart from the "Latin time" remark, nothing Fischer did (as far as the instant record shows) could possibly be called insubordinate, and the remark, while unfortunate, was not spoken with the intent to refuse a direct order.

33. The district failed to prove Fischer guilty of "willful neglect of duty," an offense which is defined as the

"intentional or reckless failure to carry out required duties." Fla. Admin. Code R. 6A-5.056(5). The evidence simply does not establish that Fischer failed to carry out her teaching duties.

34. The district failed to prove violations of either School Board Policy 4008 or School Board Policy 4.9. At least to the extent pertinent here, these policies do not prescribe substantive grounds for suspension or dismissal that enlarge the criteria set forth in rule 6A-5.056. Thus, the district's failure to prove the offenses defined in the State Board of Education's rule is equally fatal to the charges that Fischer violated either of the cited policies.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Broward County School Board enter a final order exonerating Brenda Joyce Fischer of all charges brought against her in this proceeding and awarding Fischer back salary as required under section 1012.33(6)(a).

DONE AND ENTERED this 29th day of January, 2020, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of January, 2020.

ENDNOTES

[1/] There is a dispute about whether Fischer made the "Latin time" remark upon M.G.'s arrival or later, after M.G. had asked to be excused from class. The sequence of these events is not material.

[2/] At least some of M.G.'s outrage likely resulted from Fischer's refusal to let her leave class, but this is of passing interest. The relative offensiveness of Fischer's "Latin time" remark is independent of M.G.'s subjective evaluation thereof, and, in any event, everyone agrees that Fischer shouldn't have said it, even in jest. Moreover, even if M.G. were really upset *only* about the denial of her request to be excused from class, that fact would not be dispositive disproof of just cause.

[3/] One student (D.V.) gave a contemporaneous written statement to the district in which M.G. is reported to have told Fischer "[t]hat yes we are known, hispanics [sic] are known for being late to everything but that doesn't apply to all of us." D.V. did not testify at hearing, and no one else put these words in M.G.'s mouth, so the undersigned is not finding that M.G. said this, exactly. D.V., however, was not a friendly witness to Fischer, and thus, it is unlikely that D.V. fabricated this recollection, which makes M.G. look less *righteously* indignant,

if not biased herself. At a minimum, D.V.'s statement lends support to the finding above that M.G.'s verbal complaint to Fischer is open to the interpretation that M.G. was saying, not literally but in effect, "We Spaniards are not like those other Hispanics, so don't call *me* unpunctual"—because that is what D.V. apparently heard.

[4/] There is no persuasive evidence behind the notion that Fischer intended her remark to convey genuine racial or ethnic prejudice, as M.G. asserted in rejecting Fischer's apology. It should go without saying, but perhaps bears mentioning, that the term "Latin time"—in contrast, say, to a crude racial epithet—is not unambiguously reflective of discriminatory animus. If Fischer had said "you spics are always late," for example, there would have been no doubt about discriminatory intent, and M.G.'s disbelief of Fischer's disavowal of such animus would have been justified. What Fischer actually said, however, has nowhere near the derogatory force of the hypothetical, a distinction that the district seems completely to have overlooked. Without more than the instant record discloses, the likeliest explanation for Fischer's remark is momentary thoughtlessness, which is suboptimal to be sure, but not malum in se.

[5/] There is no evidence of a consensus among Fischer's students that she yells at them often. Rather, this is the consensus opinion of a *few* students whose dislike of Fischer's photography class, which the evidence makes clear, just might have made them less than fully impartial in the matter. There is no evidence that many, or any, of Fischer's peers or supervisors shared the disgruntled students' opinion.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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

A STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 19-4175TTS

BRENDA JOYCE FISCHER,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham, Division of Administrative Hearings ("DOAH"), for final hearing by video teleconference on November 14, 2019, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Elizabeth W. Neiberger, Esquire
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For Respondent: Robert F. McKee, Esquire
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1718 East Seventh Avenue, Suite 301
Tampa, Florida 33605

STATEMENT OF THE ISSUE

The issue is whether just cause exists for Petitioner to suspend Respondent from her teaching position for five days, without pay, based upon Respondent's interactions with students

in a photography class she taught during the 2018-2019 school year.

PRELIMINARY STATEMENT

On June 12, 2019, Petitioner Broward County School Board issued an Administrative Complaint against Respondent Brenda Joyce Fischer, alleging that, while teaching the preceding school year, Ms. Fischer had made an insensitive remark about Latinos to a student named M.G. during her first-period photography class at Western High School and, at other times, had yelled at some students in that same class. At its regularly scheduled meeting on July 23, 2019, Petitioner adopted the recommendation of its superintendent that Ms. Fischer be suspended from her teaching position for five days, without pay, based upon these allegations.

Ms. Fischer timely requested a formal administrative hearing to contest Petitioner's intended action. On August 6, 2019, Petitioner referred the matter to DOAH for further proceedings. Upon assignment, the undersigned set the final hearing for September 24 and 25, 2019. A Joint Motion to Continue Final Hearing was later granted, which postponed the hearing for a couple of months.

By Order dated November 13, 2019, the undersigned granted Petitioner's motion for leave to amend the administrative

complaint, to add allegations that Ms. Fischer had mistreated C.C., another photography student.

At the final hearing, which took place on November 14, 2019, Petitioner called the following witnesses: Derek Gordon, an assistant principal at Western High School; Christine Graf, an assistant principal at Western High School; Julia Munoz, a school counselor at Western High School; a former Western High School student, M.C.; and two current Western High School students, M.G. and C.C. Petitioner's Exhibits 4 through 6 and 9 through 19 were received in evidence. Official recognition was taken of Petitioner's Exhibit 7 and of the file for DOAH Case No. 19-1928TTS. Ms. Fischer testified but did not offer any exhibits.

The final hearing transcript was filed on December 16, 2019. Each party timely filed a proposed recommended order ("PRO") on January 9, 2020, which was the deadline. The parties' PROs have been considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2019.

FINDINGS OF FACT

1. The Broward County School Board ("School Board" or the "district"), Petitioner in this case, is the constitutional

entity authorized to operate, control, and supervise the Broward County Public School System.

2. At all times relevant to this matter, Respondent Brenda Joyce Fischer ("Fischer"), was employed as an art teacher at Western High School, where she had been assigned since 2009. Fischer first became an employee of the district in 1992.

3. During the 2018-2019 school year, Fischer taught a photography class, which met during first period several days per week. The events at issue occurred in this first-period class in the early months of 2019.

4. The main incident took place on March 1, 2019, and involved a tenth-grade student named M.G., who—as she frequently did—arrived late that day to the 90-minute class, which started at 7:40 a.m. On this particular morning, M.G. walked in no earlier than 8:00 a.m. (her recollection) or as late as 8:20 a.m. (according to Fischer). Whether M.G. was 20 minutes or 40 minutes late, however, is immaterial. The important (and undisputed) fact is that M.G. was quite noticeably tardy, again.

5. Within minutes after her untimely arrival, M.G. showed Fischer a pass, which authorized M.G. to leave class early to attend a school-sponsored function. The student asked the teacher for permission to go. Fischer denied M.G.'s request because M.G. had not completed the day's assignment.

6. At some point, Fischer made the comment that gave rise to this proceeding, namely, that M.G. was operating on "Latin time" despite living in the United States (or words to this effect).[1/] Fischer's exact words have been lost to time, but the phrase "Latin time" was among them, and the gist of the remark was to suggest that M.G. was prone to running late, as Latin people are known to do (so the statement would have it).

7. M.G. claims that this remark offended her. After Fischer denied M.G.'s request to leave class for the special function, M.G. protested to Fischer about the perceived slight.[2/]

8. The undersigned credits Fischer's testimony that she did not intend to cause offense and, indeed, did not at the time regard the "Latin time" remark as a to-be-taken-seriously commentary on the unpunctuality (as the remark implies) of Latinos and Latinas. Rather, she thought it was a bon mot, something more light hearted or humorous than cutting or disparaging. Of course, as Fischer should have known, remarks of this nature, once commonplace, had by 2019 fallen into disfavor, and a culture of victimhood had arisen, which encouraged people to seek redress even for unintentional, de minimis offenses. Fischer should have known better than to utter a comment that was practically guaranteed to be called out as culturally insensitive, as indeed it is, to some degree.

There is no dispute that, despite her lack of bad intent, Fischer was in the wrong.

9. As it happened, though, M.G. was apparently less offended by the implied stereotype of Latin people as being chronically unpunctual, than by the application of the stereotype to a non-Latina such as herself. As M.G. informed Fischer when she complained about the remark, M.G.'s familial roots are in Spain, not Latin America, and thus, she identifies as European (Spanish), not Latin. This can be taken as an objection by M.G., not to the term "Latin time" per se, but to being lumped together with other Spanish speaking peoples, whose shared language, she maintains, should not be assumed to indicate similarities in other respects.[3/] The irony is that M.G.'s comment, therefore, was *itself* offensive, because her statement can reasonably be understood as an assertion that Spaniards, in general, are more punctual than Latinos.

10. The undersigned points this out, not to criticize or discredit M.G., but to illustrate that it is easy for a person innocently to make a statement which can be interpreted by another as offensive, particularly if the listener is primed to take offense. M.G. did not intend to insult Latinos by distinguishing herself from them, but her remark is, actually, somewhat insensitive in its implication, if taken at face value. It is interesting to note, as an aside, that none of the other

students took offense at M.G.'s comment. This might, in part, reflect the higher status conferred by victimhood at the hands of a teacher versus those of a student. But more likely, the indifference to M.G.'s seeming acceptance of the cultural stereotype suggests that no one present actually took the "Latin time" remark seriously as a true statement of Fischer's opinion about people of Latin descent. What the students recognized was that Fischer's ill-advised attempt at humor, which was doomed to failure because that joke isn't funny anymore (if it ever was), gave M.G. an opening, and that as soon as M.G. pounced, she had won the victim's unassailable virtue.

11. Fischer responded to M.G.'s objection appropriately, if predictably: she apologized, *twice* to M.G., and again to other students within earshot of her "Latin time" remark. M.G. rather ungraciously refused to accept Fischer's repeated apologies, accusing Fischer of being insincere about not having meant the remark to be interpreted "that way," i.e., as a mean spirited slur.[4/] Not content to let Fischer off the hook, M.G. appealed for help to the school administration, which did not hesitate to oblige. When she turned Fischer in for making the "Latin time" remark, M.G. also reported an unrelated incident involving another student, C.C., whom M.G. felt Fischer had mistreated; his story is told below. The district's disciplinary machine, its fuel having been ignited by the spark

of these accusations of prejudice, went to work, leading eventually to this hearing.

12. As regards C.C., the charges against Fischer are founded on allegations that she "yelled" at the student "aggressively" and "inappropriately." By way of background, at the time of his enrollment in Fischer's photography class, C.C. was attending school in the U.S. for the first time, having just recently emigrated from Venezuela. C.C. could not speak English when he arrived in this country.

13. C.C. used his cell phone in class as a translation tool, which everyone agrees is permissible. He also, however, frequently used his phone to communicate with others via text messages, which is generally not allowed, for obvious reasons. In fact, Fischer often observed C.C. surreptitiously texting during class when he should have been paying attention to the lesson or working on an assignment.

14. One morning, Fischer noticed that C.C. was texting instead of editing a photograph, which he was supposed to be doing. She walked up behind C.C. and, at close range in a loud voice, ordered him to get off the phone. Now, clearly, a teacher should not be subject to discipline for telling a student to stop goofing off in class. So what could Fischer have done wrong here? The district alleges that Fischer "yelled" at C.C. and contends that "yelling" constitutes a

disciplinable offense. In other words, it is not what Fischer said, but how she said it, which forms the basis of the alleged offense.

15. The fatal flaw in the district's theory is that there is no evidence of an objective standard by which to measure the relative ferocity of Fischer's vocalization. Instead, several students testified that Fischer "yelled," in their respective opinions, on this and other occasions. Fischer, for her part, acknowledged that she has a loud voice, but denied having yelled at C.C. Maybe each witness told the truth in this regard, as he or she sees it. One person's tolerance for loud sounds may differ from another's. If there is an objective standard for distinguishing "appropriate" from "inappropriate" volume levels for purposes of suspending or terminating a teacher for "yelling," however, it is certainly not established by the opinions of a few of the teacher's students.[5/] To be clear, there is no evidence suggesting that when Fischer "yelled" (as these students saw it), she was enraged, ranting, gesticulating wildly, or otherwise behaving in a manner that might indicate a potentially dangerous inability to control her emotions or actions.

16. When Fischer ordered C.C. to get off his phone, she startled him, causing the student to leave the classroom. C.C. immediately proceeded to the guidance counselor's office, to

report that Fischer's reprimanding him for unauthorized cell phone use had made him anxious and upset. The district makes much of C.C.'s emotional reaction, but it is hardly remarkable for a student to feel upset over being reprimanded. What's important here is that C.C. had not been *unjustly* reprimanded. His feelings, while understandable, are not persuasive proof of wrongdoing by Fischer.

17. The district also believes it is somehow relevant that C.C. was the subject of a Response to Intervention ("RTI") process due to his having been diagnosed with autism and ADHD in Venezuela. As a threshold matter, because Fischer taught an elective class and, hence, was not one of C.C.'s "core" teachers, it is unclear whether she knew much, if anything, about this RTI. In any event, there is no evidence that Fischer was provided any written instructions concerning accommodations that she was supposed to provide, which she thereafter failed to offer. If such documentation exists, it was not produced at hearing.

18. The few students who testified against Fischer accused her broadly of having given C.C. a hard time in class, insinuating (if not outright stating) that she did not care for C.C., specifically, because he struggled to keep up academically, nor for Spanish speaking students, in general. The evidence in this regard is nonspecific, undetailed, lacking

in context, and, in a word, thin. The proof is insufficient to support any findings of material fact.

Determinations of Ultimate Fact

19. The district has failed to prove, by a preponderance of the evidence, the charges brought against Fischer.

CONCLUSIONS OF LAW

20. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 1012.33(6)(a)2., 120.569, and 120.57(1), Florida Statutes.

21. A district school board employee against whom a disciplinary proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. Sch. Bd. of Dade Cty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J. concurring).

22. Once the school board, in its notice of specific charges, has delineated the offenses alleged to justify termination, those are the only grounds upon which dismissal may be predicated. See Lusskin v. Ag. for Health Care Admin., 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Dep't of

Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Dep't of Bus. & Prof'l Reg., 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991).

23. In an administrative proceeding to suspend or dismiss a member of the instructional staff, the school board, as the charging party, bears the burden of proving, by a preponderance of the evidence, each element of the charged offense(s). See McNeill v. Pinellas Cty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); MacMillan v. Nassau Cty. Sch. Bd., 629 So. 2d 226 (Fla. 1st DCA 1993).

24. As follows, section 1012.33(1)(a) defines, in relevant part, the term "just cause" for purposes of describing the grounds upon which a teacher's professional services contract may be terminated:

> 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, . . . gross insubordination, [or] willful neglect of duty.

25. In its Amended Administrative Complaint, the district alleges that Fischer is guilty of misconduct in office, as

defined in Florida Administrative Code Rule 6A-5.056(2); incompetency, as defined rule 6A-5.056(3)(a); gross insubordination, as defined in rule 6A-5.056(4); willful neglect of duty, as defined in rule 6A-5.056(5); violation of School Board Policy 4008; and violation of School Board Policy 4.9.

26. Whether Fischer committed any of the charged offenses is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

27. The State Board of Education has defined "misconduct in office" as meaning one of more of the following:

> (a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6A-10.080, F.A.C.;
> (b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;
> (c) A violation of the adopted school board rules;
> (d) Behavior that disrupts the student's learning environment; or
> (e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

Fla. Admin. Code R. 6A-5.056(2).

28. As the predicate acts for establishing misconduct in office, the district accused Fischer of having violated one or more of the following Principles of Professional Conduct:

> 1. [The educator s]hall 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. [The educator s]hall not intentionally expose a student to unnecessary embarrassment or disparagement.
>
> * * *
>
> 7. [The educator s]hall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

Fla. Admin. Code R. 6A-10.081(2)(a).

29. The district failed to carry its burden of proving that Fischer is guilty of misconduct in office. The only close question here is whether the bonehead "Latin time" remark is disciplinable. As found, Fischer's comment was clearly a faux pas. But was it mean spirited, racially motivated, or an expression of discriminatory animus? As a matter of fact, as found, Fischer did not intend the "Latin time" remark to be taken seriously as an ethnic slur. Her sincere apologies to M.G. and the other students should have sufficed to resolve the incident satisfactorily.

30. Further, the derogatory force of the "Latin time" remark, at least under the circumstances at issue, is simply not that strong. The undersigned cannot find that the comment in question is so offensive, on its face, that its mere utterance rises to the level of misconduct in office for purposes of establishing just cause for dismissal. The undersigned recommends, as well, that the district think long and hard about whether to base the suspension or termination of a teacher on a minor, unintentional transgression such as this. Doing so would signal that small offenses justify high outrage and serious consequences, thereby encouraging students to report on their teachers for ever more trivial infractions. This could cause classrooms to become arid environments presided over by cautious teachers who interact warily with their students, whose power as potential accusers, prudence would counsel, should remain constantly in the back of one's mind. The undersigned doubts that such fraught teacher-student relationships, within an atmosphere of distrust no less, would be conducive to learning.

31. The district likewise has not met its burden of proving that Fischer was guilty of "incompetency" through "inefficiency," which is defined, in relevant part, as meaning one or more of the following:

> 1. Failure to perform duties prescribed by law;

> 2. Failure to communicate appropriately with and relate to students; [or]
> 3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents.

Fla. Admin. Code R. 6A-5.056(3)(a). This charge failed as a matter of fact due to the insufficiency of the evidence.

32. The district failed to prove that Fischer committed "gross insubordination," defined in rule 6A-5.056(4) as "the intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority; misfeasance, or malfeasance as to involve failure in the performance of the required duties." The district contends that Fischer was directed not to scream at students, to treat all stakeholders with respect, to refrain from subjecting students to embarrassment and disparagement, and to promptly communicate with parents when students are struggling in her classes. The evidence, however, fails to establish that Fischer intentionally disobeyed a direct order by engaging in conduct that she knew had been specifically forbidden. Indeed, apart from the "Latin time" remark, nothing Fischer did (as far as the instant record shows) could possibly be called insubordinate, and the remark, while unfortunate, was not spoken with the intent to refuse a direct order.

33. The district failed to prove Fischer guilty of "willful neglect of duty," an offense which is defined as the

"intentional or reckless failure to carry out required duties." Fla. Admin. Code R. 6A-5.056(5). The evidence simply does not establish that Fischer failed to carry out her teaching duties.

34. The district failed to prove violations of either School Board Policy 4008 or School Board Policy 4.9. At least to the extent pertinent here, these policies do not prescribe substantive grounds for suspension or dismissal that enlarge the criteria set forth in rule 6A-5.056. Thus, the district's failure to prove the offenses defined in the State Board of Education's rule is equally fatal to the charges that Fischer violated either of the cited policies.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Broward County School Board enter a final order exonerating Brenda Joyce Fischer of all charges brought against her in this proceeding and awarding Fischer back salary as required under section 1012.33(6)(a).

DONE AND ENTERED this 29th day of January, 2020, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
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Filed with the Clerk of the
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this 29th day of January, 2020.

ENDNOTES

[1/] There is a dispute about whether Fischer made the "Latin time" remark upon M.G.'s arrival or later, after M.G. had asked to be excused from class. The sequence of these events is not material.

[2/] At least some of M.G.'s outrage likely resulted from Fischer's refusal to let her leave class, but this is of passing interest. The relative offensiveness of Fischer's "Latin time" remark is independent of M.G.'s subjective evaluation thereof, and, in any event, everyone agrees that Fischer shouldn't have said it, even in jest. Moreover, even if M.G. were really upset *only* about the denial of her request to be excused from class, that fact would not be dispositive disproof of just cause.

[3/] One student (D.V.) gave a contemporaneous written statement to the district in which M.G. is reported to have told Fischer "[t]hat yes we are known, hispanics [sic] are known for being late to everything but that doesn't apply to all of us." D.V. did not testify at hearing, and no one else put these words in M.G.'s mouth, so the undersigned is not finding that M.G. said this, exactly. D.V., however, was not a friendly witness to Fischer, and thus, it is unlikely that D.V. fabricated this recollection, which makes M.G. look less *righteously* indignant,

if not biased herself. At a minimum, D.V.'s statement lends support to the finding above that M.G.'s verbal complaint to Fischer is open to the interpretation that M.G. was saying, not literally but in effect, "We Spaniards are not like those other Hispanics, so don't call *me* unpunctual"—because that is what D.V. apparently heard.

[4/] There is no persuasive evidence behind the notion that Fischer intended her remark to convey genuine racial or ethnic prejudice, as M.G. asserted in rejecting Fischer's apology. It should go without saying, but perhaps bears mentioning, that the term "Latin time"—in contrast, say, to a crude racial epithet—is not unambiguously reflective of discriminatory animus. If Fischer had said "you spics are always late," for example, there would have been no doubt about discriminatory intent, and M.G.'s disbelief of Fischer's disavowal of such animus would have been justified. What Fischer actually said, however, has nowhere near the derogatory force of the hypothetical, a distinction that the district seems completely to have overlooked. Without more than the instant record discloses, the likeliest explanation for Fischer's remark is momentary thoughtlessness, which is suboptimal to be sure, but not malum in se.

[5/] There is no evidence of a consensus among Fischer's students that she yells at them often. Rather, this is the consensus opinion of a *few* students whose dislike of Fischer's photography class, which the evidence makes clear, just might have made them less than fully impartial in the matter. There is no evidence that many, or any, of Fischer's peers or supervisors shared the disgruntled students' opinion.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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