[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14319

D.C. Docket No. 1:15-cv-21915-DPG

ALBERTO FERNANDEZ,
HENNY CRISTOBOL,

Plaintiffs - Appellants,

PATRICIA RAMIREZ,

Plaintiff,

versus

THE SCHOOL BOARD OF
MIAMI-DADE COUNTY, FLORIDA,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 10, 2018)

Before MARCUS and WILSON, Circuit Judges, and HOWARD,* District Judge. MARCUS, Circuit Judge:

Again today we face the question whether the speech of two public employees of the Miami-Dade County School District is protected by the First Amendment. Whether they spoke as private citizens or public employees and about matters of public concern makes all the difference. Sometimes, answering these questions is difficult, particularly as we remember that "citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014). This is not one of those cases.

Dr. Alberto Fernandez and Henny Cristobol (occasionally referred to as "the Administrators") served as the principal and the assistant principal of Neva King Cooper Educational Center, a public school that specialized in educating students with severe physical and intellectual disabilities. Determined to improve the school's instructional quality, Fernandez and Cristobol resolved to convert Neva King into a charter school. They directed staff members to research charter conversion. They held a faculty meeting, where they attempted to mobilize the faculty's support for their initiative. Moreover, with Cristobol's assistance, Fernandez urged Neva King's Educational Excellence School Advisory Council ("the School Advisory Council") to pursue charter conversion. After the School Advisory Council agreed to hold a vote on whether to

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* Honorable Marcia Morales Howard, United States District Judge for the Middle District of Florida, sitting by designation.

convert Neva King, Fernandez and Cristobol began arranging the ballot process.

Upon discovering their efforts, the Miami-Dade County School Board launched an investigation and disciplined both of them. Fernandez and Cristobol sued in federal court, alleging that the School Board's response to their conversion efforts abridged their freedom of speech and association in violation of the First Amendment. The district court concluded that their speech was not constitutionally protected because it was uttered pursuant to and as part of their "official duties" as public employees, and, therefore, granted summary judgment to the School Board.

We hold that *D'Angelo v. School Board of Polk County*, 497 F.3d 1203 (11th Cir. 2007), compels the affirmance of the district court's judgment, and that the Supreme Court's most recent opinion in *Lane v. Franks*, 134 S. Ct. 2369 (2014), does not undermine, let alone abrogate *D'Angelo*'s precedential effect. At the end of the day, the Administrators spoke not as private citizens but as the principal and assistant principal of a public school, pursuant to their official duties, when they undertook to convert their public school into a charter school. Under controlling precedent, their speech was not protected by the First Amendment.

I.

A.

In the summer of 2011, the principal and assistant principal of Neva King became interested in converting their school into a charter school under Florida law. The principal, Dr. Fernandez, explained that a conversion to a charter school would yield "better programs and services to our students," it would increase funding from the state and federal government, and "perhaps get the private sector involved" in the affairs of the school. Accordingly, Fernandez directed staff members, including Cristobol, to learn more about charter conversion. The Administrators devoted substantial time and effort to their pursuit, conducting research, drafting budget proposals, and currying support among community members.

On February 2, 2012, Fernandez addressed a meeting of Neva King's Educational Excellence School Advisory Council – a body consisting of interested community members, including parents, teachers, students, administrators, support staff, and business leaders, and devoted to improving the school's educational performance. *See* Fla. Stat. § 1001.452. Fernandez recommended that the School Advisory Council vote to apply for charter conversion. The Advisory Council agreed, and submitted an official request to the principal to conduct a conversion vote. Also on February 2, 2012, Fernandez held a meeting with the faculty and delivered a PowerPoint presentation in support of charter conversion. He invited attorney Robin Gibson

to address the faculty and answer their questions. Fernandez and Cristobol then scheduled a date to take a vote of the school's parents and teachers. After convening the School Advisory Council and the faculty, Fernandez notified his superiors on the School Board of his intention to conduct a charter conversion vote. In response, the School Board dispatched personnel to Neva King to monitor all meetings where conversion was discussed and to prevent the principal from directly addressing the parents.

The conversion attempt quickly unraveled. On April 4, 2012, the School Advisory Council sent another letter to Fernandez, this time notifying him that "[e]ffective immediately, we are rescinding our request to apply for possible conversion to charter status." And on April 20, 2012, the School Board informed Fernandez and Cristobol that they were under investigation by the School District's Civilian Investigative Unit based on allegations that they had exploited their official positions to influence the vote, and that they had inappropriately devoted school time and resources to these efforts. The School Board placed them on alternative assignments during the pendency of the investigations, and warned them that they were forbidden to "contact, visit, or engage in any type of communication with staff, parents, or community members from" the school or to "contact or engage in any type of communications with the subject of, or witness[es]" to the investigations. Fernandez and Cristobol's reassignments consisted of tedious tasks for which they were overqualified.

Not surprisingly, the investigations revealed that the Administrators had met regularly with faculty and staff during school hours to discuss charter conversion. The investigative reports, released on June 22 and July 13, 2012, found probable cause to believe that Fernandez and Cristobol violated School Board policies relating to ethical standards, staff interactions, internet use and safety, and staff email use. The reports also included several statements from School District officials representing that, in attempting to convert Neva King to a charter school, the Administrators exceeded their official duties. The School Board reviewed the probable cause findings and informed Fernandez and Cristobol that they were subject to discipline.

B.

During the course of the investigations, Fernandez and Cristobol initiated an administrative proceeding against the School Board with the Florida Department of Administrative Hearings under Florida Statutes Section 1002.33(4)(a)(1). They claimed that the reassignments and "gag orders" – the prohibitions on interacting with potential witnesses during the investigations – amounted to unlawful reprisal. *See* Fla. Stat. § 1002.33(4)(a) (prohibiting "unlawful reprisal," defined as "an action taken by a district school board or a school system employee against an employee who is directly or indirectly involved in a lawful application to establish a charter school, which occurs as a direct result of that involvement, and which results in [adverse employment action]"). A final hearing was held

in early 2014, after which a state administrative law judge concluded that the School Board committed an unlawful reprisal against Fernandez and Cristobol. The judge also specifically found that, in advocating charter conversion, the Administrators acted pursuant to their official duties. He observed that the Florida Statutes obligate the principal to arrange the vote on charter conversion, and that, when Fernandez and Cristobol did so, they necessarily acted in their official capacities.

The Florida Department of Education adopted the administrative law judge's recommendation in a final order dated November 6, 2014. The Department awarded Fernandez out-of-pocket expenses and lost employment bonuses totaling $10,590. However, the Administrators were not reinstated to their former positions. Thereafter, Fernandez accepted a new position within the School District as Exceptional Education principal assigned to the Special Education Outreach program at Ruth Owens Kruze Educational Center. Cristobol voluntarily left the School District to become the principal of Villa Lyan Academy, a charter school.

In May 2015, Fernandez and Cristobol sued the School Board in the United States District Court for the Southern District of Florida. They brought a single claim under 42 U.S.C. § 1983 alleging that the School Board infringed their rights to freedom of speech and association by subjecting them to adverse employment action. They sought compensatory damages, including lost wages, and reinstatement to their former positions,

among other relief. Following discovery, the School Board moved for summary judgment.

The School Board's central argument was that the Administrators' pursuit of charter conversion and their concomitant speech fell squarely within their official duties. As a consequence, they spoke not as private citizens, but rather as public employees, insulating their speech from the protection of the First Amendment. The district court agreed. In attempting to convert the public school, the Administrators spoke at their workplace, during working hours, and with the aid of school resources. Their speech was covered by their formal job descriptions. And insofar as some School District officials made various statements that Fernandez and Cristobol's conversion efforts were not part of their official responsibilities, the court found that evidence to be immaterial, since the status of their speech was a legal question for the court, not for School District officials, to decide. Because Fernandez and Cristobol plainly spoke in the course of their official duties, their speech did not enjoy First Amendment protection, and the School Board was entitled to summary judgment.

The Administrators filed this timely appeal in our Court.

II.

We review *de novo* a district court's grant of summary judgment, applying the same legal standards that governed the district court. *Feliciano v. City of*

Miami Beach, 707 F.3d 1244, 1247 (11th Cir. 2013). Summary judgment is appropriate when the record evidence shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Id*. The only issue we address today is whether the district court properly concluded that the Administrators' speech was not protected by the First Amendment. We hold that it did.

A.

To determine whether a public employee may invoke the safeguards of the First Amendment, we begin by asking whether the employee spoke as a public employee pursuant to his official duties or as a private citizen on matters of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). If the employee spoke pursuant to his official duties, then he is denied protection under the First Amendment, thereby ending the inquiry. *Id*. If, however, he spoke as a private citizen on matters of public concern, the question becomes "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id*. at 418. In that event, the Supreme Court has instructed us in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny that we must balance the employee's interest in speaking freely and openly about matters of public concern against the State's interest "as an employer in promoting the efficiency of the public services it performs through its employees." *Id*. at 568. The question, then, boils down to whether

the principal and assistant principal spoke pursuant to their official duties when they spearheaded a charter conversion effort for their school.

We addressed a nearly identical question in *D'Angelo v. School Board of Polk County*, 497 F.3d 1203 (11th Cir. 2007). There, Michael D'Angelo, the principal of Kathleen High School, explored converting his school into a charter school under Florida law. *Id*. at 1206. As principal, his job description included the obligation to "provide leadership for and implement school improvement initiatives." *Id*. at 1207. During his charter conversion effort, D'Angelo attended a seminar on charter schools, held staff meetings, and directed faculty members to study charter schools. *Id*. at 1206. He also wrote to his assistant principal that, "with the charter opportunities granted by the State of Florida, he would be remiss in his duties as the leader of Kathleen High School if he did not explore any and all possibilities to improve the quality of education at the school." *Id*. His initiative ultimately foundered and the school district terminated him. *Id*. at 1207. He responded by filing a First Amendment retaliation claim in federal court. *Id*. During trial, the district judge ruled for the School Board after the close of D'Angelo's case in chief, entering judgment as a matter of law. *Id*. The court held that, under *Garcetti*, D'Angelo's speech was not protected by the First Amendment. *Id.*

On appeal, we applied *Garcetti* and assessed whether D'Angelo sought charter conversion pursuant to his official duties as the principal of Kathleen High. *Id*. at 1210. Our decision hinged on two essential

considerations. First, we looked to the Florida Statutes' description of charter conversion and observed that "[a]n application for a conversion charter school shall be made by the district school board, *the principal*, teachers, parents, and/or the school advisory council." *Id*. (quoting Fla. Stat. § 1002.33(3)(b)) (emphasis added). "Because there [was] no evidence that D'Angelo was a parent or a teacher, his efforts to convert Kathleen High to charter status necessarily were in his capacity as the principal of the school." *Id*. Second, we relied on D'Angelo's admissions at trial. *Id*. Although he testified that charter conversion was not one of his assigned duties, he conceded that he explored charter conversion pursuant to his "number one duty," which was to "improve the quality of education" at Kathleen High. *Id*. Since Florida law clarified that D 'Angelo administered the conversion effort pursuant to his official duties, and because D'Angelo effectively admitted as much at trial, we concluded that his speech was not protected by the First Amendment and affirmed judgment for the school board. *Id*.

The factual matrix presented by *D'Angelo* is on all fours with this case. For starters, Dr. Fernandez's job description provided that he was responsible for "providing effective education leadership" by "developing and implementing plans that effectively utilize the personnel and material resources necessary to produce a quality instructional program." Similarly, Assistant Principal Cristobol's occupational summary listed among his official duties "[a]ssist[ing] the principal in planning and administering the instructional program

and in conducting other activities necessary to provide quality instruction."

Moreover, both Florida law and Fernandez's statements fully support the determination that he and Cristobol advocated charter conversion pursuant to their official duties. Florida law establishes the process for effecting the conversion of a public school to a charter school. Among other things, it enumerates who may apply for charter conversion, expressly including the principal. Fla. Stat. § 1002.33. Again, the statute provides: "An application for a conversion charter school shall be made by the district school board, the principal, teachers, parents, and/or the school advisory council." *Id*. Just as in *D'Angelo*, Principal Fernandez and Assistant Principal Cristobol held numerous staff meetings, spoke to many key players including the school faculty, and arranged for a vote on charter conversion. And, just as in *D'Angelo*, the Administrators did not claim to have launched their conversion effort as teachers or parents. *See D'Angelo*, 497 F.3d at 1210. Plainly, their "efforts to convert [Neva King] to charter status necessarily were in [their] capacit[ies] as the principal [and assistant principal] of the school." *Id.*

Moreover, Florida regulations likewise provide that, in order to initiate the ballot process for charter conversion, "[a] district school board, the principal, teachers, parents, and/or the school advisory council at an existing school . . . may submit a request in writing to the school administrator to conduct a vote for conversion. . . . The administrator shall initiate the ballot process within sixty (60) days of the written request. . . ."

Fla. Admin. Rule 6A-6.0787. In order to conduct a vote on a charter conversion, an official request must be sent to the principal who, in turn, is responsible for initiating the ballot process. Here, it is undisputed that the Educational Excellence School Advisory Council sent Dr. Fernandez an official request to conduct a charter conversion vote. Fernandez then scheduled a vote. Under Florida law, Fernandez and Cristobol necessarily acted as "administrator[s]," and not as private citizens, when they received the School Advisory Council's official request and began arranging the vote.

We add that, during the state administrative hearing, the administrative law judge found that Fernandez and Cristobol's pursuit of charter conversion fell squarely within their official duties. Indeed, he concluded that the School Board's actions were "plainly at odds with" Florida regulations, which "*obligate[d]*" the principal to oversee the charter conversion ballot process. He observed that "no reasonable person would expect" those duties to be executed in a private capacity. The Florida Department of Education adopted that finding wholesale.

Further, Miami-Dade County Public Schools Policy 9150, entitled "Visitors Invited by Other Administrators," provides that "[s]upervisory or administrative staff who have invited professional visitors may elect to receive the visitors whom they have invited, as well as other visitors who may have a mutual interest or area of competency." At the February 2, 2012 faculty meeting, Fernandez and Cristobol, again in the exercise of their official duties, invited attorney Robin

Gibson to speak about charter conversion. Thus, on top of Florida's statutory and regulatory regime, Miami-Dade School District policy suggests that the Administrators spoke as public officials acting pursuant to their official duties when they advocated charter conversion.

Also, just as in *D'Angelo*, Fernandez and Cristobol effectively conceded that they sought charter conversion pursuant to their official duties. Thus, for example, on February 2, 2012, Margaret Getchell, the School Advisory Council's Chairperson, sent a letter to Fernandez accepting his recommendation and requesting a conversion vote. The letter read this way: "On behalf of the Educational Excellence School Advisory Council, please accept this letter as an *official* request to conduct a vote to submit an application to convert Neva King Cooper Educational Center to a charter school . . . " (emphasis added). When asked about the Advisory Council's "official request" at the state administrative hearing, Fernandez replied, "Yes. This is a letter that I drafted for Ms. Getchell after I recommended to the [Advisory Council] to consider conducting a vote to submit an application for conversion charter. And the [Advisory Council] voted unanimously in favor of it. And the next step was for me, *as the principal*, to receive the request in writing to conduct the vote, and this is such request" (emphasis added).

The principal's efforts did not end there; nor did his description of those efforts. On February 10, 2012, Fernandez sent a memorandum to Associate Superintendent Milagros R. Fornell responding to Fornell's

warnings that Fernandez's conversion efforts threatened to violate the School Board's ethical standards. Fernandez replied that he had reviewed the standards and, "[a]ccording to Florida Statutes, the official duties of a principal can include an application for charter status." As principal, he was "by law allowed to make" every effort to convert Neva King to a charter school.

Indeed, in a section of their amended complaint entitled "The Principal's Role in a Charter School Conversion," the plaintiffs averred that Fernandez exercised his statutory authority under Florida law when he pursued charter conversion. Specifically, they alleged, after the School Advisory Council agreed to hold a vote, Fernandez was "vested *exclusively*" with the responsibility to initiate the balloting within sixty days of the Advisory Council's request; ensure that only eligible voters participated; appoint an arbitrator to tally the votes; and complete the vote at least thirty days before the charter application deadline. In fact, they claimed that the School Board "asserted itself to dominate the [charter conversion] process and usurp the authority granted by Florida law to the principal." Thus, in their own complaint, the Administrators characterized their receipt of the Advisory Council's request and their initiation of the ballot process as "The Principal's Role in a Charter School Conversion."

Finally, at Fernandez's deposition, the following exchange took place:

> Q. Now, in your capacity as the principal, around the fall of 2011, you met with Mrs.

> Ramirez and Mr. Cristobol and you asked them to research what would be necessary to convert Neva King Cooper into a charter school; true?
>
> [Fernandez]. I was the principal at Neva King Cooper, and at the time that I asked them to look into the feasibility or exploring the idea, yes.

Despite some equivocation, Fernandez was asked whether, in his capacity as principal, he met with Cristobol and directed him to research charter conversion; Fernandez acknowledged that he did. Likewise, when asked about attorney Gibson's visit, Fernandez was asked:

> Q. [Gibson] couldn't come unless you allowed him to come on school grounds?
>
> [Fernandez]. Of course.

Fernandez conceded that, in inviting and receiving Gibson at the February 2012 faculty meeting, he exercised his official authority pursuant to Miami-Dade County Public Schools Policy 9150 and Florida's statutory regime.

In short, the application of Florida law and the Administrators' statements in this case yields the same result as in *D'Angelo*. What's more, this result is wholly consistent with all of our *Pickering* caselaw, including *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009); *Alves v. Board of Regents*, 804 F.3d 1149 (11th Cir. 2015); and *Moss v. City of Pembroke Pines*, 782 F.3d 613 (11th Cir. 2015). Our cases have identified, among

others, these considerations as relevant in determining whether a public employee spoke pursuant to his official duties: (1) speaking with the objective of advancing official duties; (2) harnessing workplace resources; (3) projecting official authority; (4) heeding official directives; and (5) observing formal workplace hierarchies. *See Abdur-Rahman*, 567 F.3d at 1280, 1283–84; *Alves*, 804 F.3d at 1161, 1164–65; *Moss*, 782 F.3d at 618–20. Dr. Fernandez and Assistant Principal Cristobol checked virtually every relevant box.

B.

Fernandez and Cristobol advance several objections. None are persuasive. First, they claim that *Lane v. Franks*, 134 S. Ct. 2369 (2014), narrowed the construction of "official duties" set forth in *Garcetti*, and that the application of *Lane* should yield a different result today. There, a public employee, Edward Lane, was fired after testifying under oath before a grand jury and twice at a criminal trial pursuant to subpoena. *Id*. at 2375. It was undisputed that Lane's testimony was not given pursuant to his official duties. *Id*. at 2378 n.4. The Supreme Court held that the First Amendment protected Lane's speech because "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment." *Id*. at 2378. *Lane* thus clarified that *Garcetti* divests speech of First Amendment protection when it is uttered

pursuant to a public employee's official duties – not just if it merely *concerns or relates to* those duties. *Id*. at 2379. Fernandez and Cristobol cite *Lane*, suggesting somehow that they did not seek charter conversion pursuant to their official duties; rather their efforts only concerned or related to their duties.

But *Lane* was a wholly different case. There, Edward Lane spoke pursuant to an independent duty, binding all private citizens, to testify truthfully in judicial proceedings. *Id.* at 2379. The fact that Lane's testimony concerned information acquired in his official capacity did not change the source of his obligation to testify. *Id.* In sharp contrast, under Florida law, only a parent, a teacher, or a principal may trigger the charter conversion process. A private citizen cannot. Nor can a private citizen oversee the ballot process designed to effect the conversion. Florida law expressly delegates the tasks of overseeing the charter conversion ballot process to the principal. When Dr. Fernandez and Assistant Principal Cristobol attempted to convert Neva King Cooper Educational Center into a charter school, and sought to arrange a vote, they invoked their official prerogatives under Florida law.

Moreover, since *Lane* was decided, our cases have continued to cite and give effect to *D'Angelo*'s holding. Thus, for example, *Alves* presented the question whether a memorandum composed by university employees documenting their superior's poor leadership constituted public-employee speech beyond the protection of the First Amendment. 804 F.3d at 1153. A panel of this Court held that, because the employees drafted

the memorandum in order to correct conduct that interfered with their official duties, they penned it pursuant to those duties. *Id*. at 1164–65. We relied almost exclusively on pre-*Lane* precedent, including *D'Angelo*. *Id*. We observed that *Lane* did not create "a substantial shift in the law" but rather, if anything, offered "a slight modification and a useful clarification." *Id*. at 1163. Similarly, in *Moss*, we addressed whether an Assistant Fire Chief for the Pembroke Pines Fire Department spoke pursuant to his official duties when he criticized the Department's collective bargaining strategy. 782 F.3d at 616–17. We held that he did and again compared the case to *D'Angelo*. *Id*. at 620 (citing *D'Angelo*, 497 F.3d at 1210). We labeled our inquiry "*Garcetti Analysis*" and relied almost entirely on pre-*Lane* caselaw. *Id*. at 620–21.

Alves and *Moss* instruct us that, while *Lane* explicated some of the boundaries of *Garcetti* and its progeny, it did not disrupt our pre-*Lane* precedent, let alone unclench *D'Angelo*'s grip on this case. *Lane* cannot save Fernandez and Cristobol from summary judgment.

The Administrators further urge that they did not speak pursuant to their official duties because charter conversion was not among their "ordinary" responsibilities. In *Garcetti*, the Supreme Court framed the relevant question as being whether the speech was uttered "pursuant to the employee's official duties." 547 U.S. at 413. In *Lane*, the Supreme Court modified the phrasing slightly, although not the substance of the question, and asked whether the employee spoke pursuant to his "ordinary job duties." 134 S. Ct. at 2378. Fernandez

and Cristobol lean heavily on the extensive use of the phrase "ordinary job duties" and argue that "neither Fernandez nor Cristobol, during their many prior years of employment with the District, had ever initiated charter school discussions [before fall 2011]." Their argument misses the mark. In order to determine whether speech is uttered as a private citizen or as a public employee, we ask not whether the speech itself is made ordinarily and regularly. Rather, we inquire whether the speech falls within an ordinary duty. It is entirely consistent with *Lane* to conclude that Fernandez and Cristobol spoke pursuant to their ordinary duties even though they had never before attempted a charter conversion.

To illustrate the point, in *Alves*, the Court explained that "[w]hile the memorandum does not bear the hallmarks of daily activity," it was drafted "in the course of performing – or, more accurately, in the course of *trying* to perform – their ordinary roles as coordinators, psychologists, committee members, and supervisors," and could not "reasonably be divorced from those responsibilities." 804 F.3d at 1164–65. We did not read *Lane* as requiring that the speech itself was made frequently. The employees spoke pursuant to their ordinary duties because they wrote the memorandum "in the course of performing [their] jobs." *Id*. Our caselaw compels the conclusion that Fernandez and Cristobol pursued charter conversion in their official capacities as well. They too spoke pursuant to their ordinary duties even though they had initiated a charter conversion on only one occasion.

Fernandez and Cristobol also claim that the duty of exercising "leadership" over Neva King cannot be characterized as "ordinary" because the term "leadership" is too amorphous and too closely related to advocacy and other bedrock First Amendment activity. That argument is foreclosed by *D'Angelo* as well. We held that D'Angelo spoke pursuant to his official duties in part because he sought a charter conversion in order to improve the quality of education at Kathleen High, which was part of his official duties; indeed it was an obligation he described as his "number one duty." *D'Angelo*, 497 F.3d at 1210. D'Angelo claimed that those statements were related to his "moral obligations as a human being" and not to his professional responsibilities. *Id*. We rejected the argument, holding that "[a]ny reasonable reader of [D'Angelo's emails and statements] would understand that D'Angelo believed he was obliged to carry out his duties as the leader of Kathleen High and pursue charter conversion." *Id*.

And in *Alves*, we defined the scope of the university employees' ordinary duties as fulfilling their "roles as coordinators, psychologists, committee members, and supervisors." 804 F.3d at 1164. We compared the case to *D'Angelo*, where D'Angelo's "broad administrative responsibilities" rendered his speech unprotected. *Id*. at 1165. The phrase "broad administrative responsibilities" was neither nebulous nor unclear. We reaffirmed *D'Angelo*'s holding that, when a public employee's duties include "broad administrative responsibilities," and the employee speaks pursuant to those duties, then the speech is not protected by the First Amendment.

Id.; *see also Moss*, 782 F.3d at 618–19 (holding that Moss's speech was insulated from First Amendment protection because it fell within his official duty to "ensure that the fire department provided the best service possible").

The long and short of it is that the principal and assistant principal of Neva King Cooper Educational Center spearheaded this charter school conversion pursuant to their official duties. They may not sue the School Board under the First Amendment. We affirm.

AFFIRMED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-21915-GAYLES

ALBERTO T. FERNANDEZ,
HENNY CRISTOBOL, and
PATRICIA RAMIREZ,
Plaintiffs,

v.

THE SCHOOL BOARD
OF MIAMI-DADE
COUNTY, FLORIDA,
Defendant. /

ORDER

(Filed Jun. 12, 2017)

THIS CAUSE comes before the Court on the Motion for Summary Judgment filed by the Defendant, the School Board of Miami-Dade County (the "School Board") [ECF No. 54]. The Court has carefully considered the parties' briefs, the record in this case, and the applicable law and is otherwise fully advised in the premises. For the reasons that follow, the School Board's motion shall be granted as to Plaintiffs Alberto T. Fernandez and Henny Cristobol and denied as to Plaintiff Patricia Ramirez.

I. BACKGROUND

In this First Amendment action, the Plaintiffs (all current or former employees of Miami-Dade County

Public Schools (the "School District" or the "District")) allege that the School Board unlawfully took adverse employment action against them in retaliation for their attempt (which ultimately failed) to convert Neva King Cooper Educational Center ("Neva King")—a Miami-Dade County public school at which the Plaintiffs all formerly held positions—into a charter school. In the fall of 2011, Dr. Fernandez, who was then principal at Neva King, directed members of his staff, including Cristobol (who was then assistant principal) and Ramirez (who was then a Placement Specialist), to research how they could convert Neva King from a public school into a charter school. The three devoted countless hours to conducting research, drafting proposed budgets, communicating via the School District's email system, and contacting third parties to discuss the topic. On February 2, 2012, at a meeting of Neva King's Educational Excellence School Advisory Council ("EESAC"), Dr. Fernandez recommended that the EESAC consider conducting a vote to submit an application for charter conversion. The EESAC voted in favor of the proposal to explore a possible charter school conversion and voted to hold a charter school vote. Dr. Fernandez held a faculty meeting that day, as well, where he discussed the idea of conversion with the staff. The Plaintiffs scheduled a date to take a vote of the school's parents and teachers.

Dr. Fernandez subsequently informed his superiors of the events and the intention to conduct a charter school vote. From that point, the School District dispatched personnel to be stationed at Neva

King. District officials were present at all meetings to discuss the charter conversion, and these officials would not permit Dr. Fernandez to address the parents.

The conversion attempt was terminated two months later. Dr. Fernandez and Cristobol were notified in writing that they was [sic] being investigated for allegations that they, *inter alia*, had used their positions as principal and assistant principal at Neva King to influence the outcome of the proposed charter school conversion and that they had inappropriately used school time and resources in furtherance of the conversion. Fernandez Aff. [ECF No. 59-3] Ex. G; Cristobol Aff. [ECF No. 59-2] Ex. C. Ramirez was notified that she was being investigated for allegations that she inappropriately used school time and resources to conduct non—school-related business. Ramirez Aff. [ECF No. 59-1] Ex. C. Each of the Plaintiffs was placed on alternative assignment during the pendency of the investigations and was informed that he or she was forbidden to "contact, visit, or engage in any type of communication with staff, parents, or community members from" Neva King or to "contact or engage in any type of communications with the subject of, or witness(es)" to the pending investigations. Fernandez Aff. Ex. H; Cristobol Aff. Ex. D; Ramirez Aff. Ex. D.

The investigations revealed that Dr. Fernandez and Cristobol had met with faculty and staff during school hours to discuss the proposed charter school conversion; Dr. Fernandez admitted that he worked on the attempt during school hours. The investigation

also revealed that Ramirez had also used work time and resources in researching the charter school conversion. And on June 22 and July 13, 2012, the final investigative reports of the CIU investigation into the allegations against the Plaintiffs were released, which concluded that there was probable cause that the Plaintiffs had violated School Board policies dealing with standards of ethical conduct, code of ethics, staff network and internet acceptable use and safety, and staff electronic mail. As a result of these findings, conferences for the record were held with Dr. Fernandez, Cristobol, and Ramirez on July 19, July 20, and August 2, 2012, respectively. The probable cause findings were reviewed with the respective Plaintiffs, and they were informed that they could be subject to disciplinary action.

During the course of the investigations, the Plaintiffs initiated an unlawful reprisal proceeding against the School Board, contending that the reassignments and gag orders during the investigation violated Florida law. The Department of Administrative Hearings held a final administrative hearing in early 2014. At the conclusion of the hearing, the administrative law judge issued a recommended order finding that the School Board had committed an unlawful reprisal against the Plaintiffs in violation of Fla. Stat. § 1002.33(4). The Florida Department of Education adopted the ALJ's recommended order in a final order dated November 6, 2014.

In their Second Amended Complaint, filed on January 25, 2016, the Plaintiffs bring a single claim under

42 U.S.C. § 1983, alleging that the School Board infringed on their freedoms of speech and association and subjected them to adverse employment actions, in violation of the First Amendment to the United States Constitution. The Court denied the School Board's motion to dismiss, and now, following discovery, the School Board has moved for summary judgment on the Plaintiffs' claim. The Plaintiffs oppose the motion.

II. LEGAL STANDARD

Summary judgment, pursuant to Federal Rule of Civil Procedure 56(a), "is appropriate only if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Tolan v. Cotton*, 572 U.S. ___, ___, 134 S. Ct. 1861, 1866 (2014) (per curiam) (quoting Fed. R. Civ. P. 56(a)) (internal quotation marks omitted); *see also Alabama v. North Carolina*, 560 U.S. 330, 344 (2010). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no ***genuine*** issue of ***material*** fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

An issue is "genuine" when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the nonmoving party in light of his burden of proof. *Harrison v. Culliver*, 746 F.3d 1288, 1298 (11th Cir. 2014). And a fact is "material" if, "under the

applicable substantive law, it might affect the outcome of the case." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004) (citations and internal quotation marks omitted). "Where the material facts are undisputed and all that remains are questions of law, summary judgment may be granted." *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1138 (11th Cir. 2016).

The Court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *SEC v. Monterosso*, 756 F.3d 1326, 1333 (11th Cir. 2014). However, to prevail on a motion for summary judgment, "the nonmoving party must offer more than a mere scintilla of evidence for its position; indeed, the nonmoving party must make a showing sufficient to permit the jury to reasonably find on its behalf." *Urguilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1050 (11th Cir. 2015).

III. DISCUSSION

A. *First Amendment*

The thrust of the School Board's summary judgment argument is that the Plaintiffs' speech is not entitled to First Amendment protection because they did not speak as citizens on a matter of public concern when they attempted the charter school conversion. The Court, in its previous decision denying the School Board's motion to dismiss, laid out the pertinent legal framework on this issue:

"Speech by citizens on matters of public concern lies at the heart of the First Amendment." *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014). "Government regulation of employees' speech differs from its regulation of the speech of its citizenry," however, because the government, "[a]cting as an employer, . . . is afforded broad discretion in its employment decisions." *Boyce v. Andrew*, 510 F.3d 1333, 1341 (11th Cir. 2007) (per curiam). But "[a] government employer may not demote or discharge a public employee in retaliation for speech protected by the First Amendment," as a public employee "does not 'relinquish the First Amendment rights he would otherwise enjoy as [a citizen] to comment on matters of public interest.'" *Alves v. Bd. of Regents of Univ. Sys.*, 804 F.3d 1149, 1159 (11th Cir. 2015) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)), *cert. denied*, 136 S. Ct. 1838 (2016); *see also Lane*, 134 S. Ct. at 2377 ("[P]ublic employees do not renounce their citizenship when they accept employment, and [the Supreme Court] has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights.").

As they are public employees, the Plaintiffs' First Amendment claims are subject to a four-stage analysis. *Moss v. City of Pembroke Pines*, 782 F.3d 613, 617 (11th Cir. 2015). First, the Court must consider whether their speech was made as a citizen and whether it implicated a matter of public concern. *Id.* If this requirement is satisfied, the Court must weigh the Plaintiffs' First Amendment interests

> against the School Board's interest in regulating their speech to promote "the efficiency of the public services it performs through its employees." *Id.* at 618 (quoting *Carter v. City of Melbourne*, 731 F.3d 1161, 1168 (11th Cir. 2013)). These two questions are questions of law for the Court to decide. *Id.* If the Court finds that the speech is protected, the analysis proceeds to stage three, which requires the Plaintiffs to show that their speech was a substantial motivating factor in the School Board's adverse employment action. *Id.* And if the Plaintiffs make this showing, the burden shifts to the School Board to prove that it would have reached the same decision even in the absence of the protected speech. *Id.* Because these final two questions, which address the causal link between the Plaintiffs' speech and the alleged adverse employment actions, are questions of fact, a jury must resolve them unless the evidence is undisputed. *Id.*

Fernandez v. Sch. Bd., 201 F. Supp. 3d 1353, 1368 (S.D. Fla. 2016). The School Board re-raises the same single argument it raised in its motion to dismiss: that the Plaintiffs' speech in furtherance of the Neva King conversion attempt was employee speech. The Eleventh Circuit recently weighed in on this question:

> The Supreme Court in *Garcetti* [*v. Ceballos*, 547 U.S. 410 (2006),] explained that the line between speaking as a citizen or as a public employee turns on whether the speech "owes its existence to a public employee's

professional responsibilities." [*Id.*] at 421-22. If the speech does, then "[r]estricting [it] . . . does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.*; *see also Boyce v. Andrew*, 510 F.3d 1333, 1342-43 (11th Cir. 2007) (collecting cases "[f]ollowing *Garcetti*" in which we interpreted the phrase "owes its existence to"). In *Lane v. Franks*, 134 S. Ct. 2369 (2014), the Supreme Court clarified what it meant in *Garcetti* when it used the phrase "owes its existence to":

> [T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. . . .

Id. at 2379. We subsequently explained that "[a]fter *Lane*," *Garcetti's* phrase "owes its existence to . . . must be read narrowly to encompass speech that an employee made ***in accordance with or in furtherance of*** the ordinary responsibilities of her employment, not merely speech that ***concerns*** the ordinary responsibilities of her employment." *Alves*, 804 F.3d at 1162.

Carollo v. Boria, 833 F.3d 1322, 1329 (11th Cir. 2016) (emphases added) (footnote omitted). In *Garcetti*, the Supreme Court explained that a court must make a "practical" inquiry to determine whether speech "owes its existence to" an employee's professional duties. 547 U.S. at 424. Practical factors that may be relevant to, but not dispositive of, that inquiry include the employee's job description, whether the speech occurred at the workplace, and whether the speech concerned the subject matter of the employee's job. *Moss*, 782 F.3d at 618.

At the outset, it is undisputed that the majority of the speech took place at Neva King. Each of the Plaintiffs has admitted to using school time and resources to research the charter conversion, and the charter conversion was discussed at the Neva King EESAC meeting and in a Neva King faculty meeting.

Turning to the Plaintiffs' job descriptions, the first duty listed on the job description for Exceptional Education Principal—the position Dr. Fernandez held at Neva King—is "[p]rovid[ing] educational leadership by developing and implementing plans that effectively utilize the personnel and material resources necessary to produce a quality instructional program that is responsive to the needs of the identified student population." Fernandez Aff. Ex. A. Similarly, the first duty listed on the job description for ESE Assistant Principal—the position Cristobol held—is "[a]ssist[ing] the principal in planning and administering the instructional program and in conducting other activities necessary to provide quality instruction." Cristobol Aff.

Ex. A. Although formal job descriptions "often bear little resemblance to the duties an employee actually is expected to perform, *Garcetti*, 547 U.S. at 424-25, Dr. Fernandez and Cristobol have proffered no evidence to even suggest that the duties they were expected to perform as principal and assistant principal, respectively, varied in any way from these listed duties. And given that "[a]ctivities undertaken in the course of performing one's job are activities undertaken 'pursuant to employment responsibilities,'" *Alves*, 804 F.3d at 1164, the Court must find that Dr. Fernandez's and Cristobol's speech in furtherance of the charter school conversion was employee speech under *Garcetti.* It would make little sense to conclude that the charter school conversion attempt was anything but an example of Dr. Fernandez developing a plan to effectively utilize his resources to produce an instructional program responsive to the needs of Neva King students, or that Cristobol's participation in the conversion was anything but an example of providing assistance to the principal in conducting the activities necessary to provide quality instruction—precisely in line with their listed duties.

The Plaintiffs contend that they did not speak as employees because several School District officials concluded in disciplinary memoranda that converting Neva King into a charter school was not part of the Plaintiffs' official duties. This contention is of no moment. The subjective beliefs of various individual officials do not transform the character of Dr. Fernandez's or Cristobol's speech into citizen speech. Simply

because speech "regard[s] conduct that interferes with an employee's job responsibilities" does not necessarily mean that that speech "is not itself ordinarily within the scope of the employee's duties." *Id.* at 1165. The Court concludes that Dr. Fernandez and Cristobol's speech in furtherance of the Neva King charter conversion was employee speech, and is therefore outside the scope of the protections of the First Amendment.

As to Ramirez, the Court comes to the opposite conclusion. As a placement specialist, Ramirez's listed job duties included determining eligibility and placement for exceptional students, providing professional development in-service training to schools, monitoring one-to-one paraprofessionals, and participating in and preparing cases for due process hearings. *See* Ramirez Aff. Ex. A. Considering these duties and the other evidence submitted, the Court finds that Ramirez's speech vis-à-vis the charter conversion lies more in the second category outlined in *Alves*—speech that merely "concerns the ordinary responsibilities of her employment," rather than speech made "in accordance with or in furtherance of the ordinary responsibilities of her employment." 804 F.3d at 1162. As a placement specialist, Ramirez was involved in aspects of the education of the students at Neva King, and certainly, the Court presumes, wished for them to have the best education possible. But despite these presumed good intentions, her position as a placement specialist did not involve the broad administrative and curricular responsibilities that the positions of principal and assistant principal would involve. As a result, Ramirez's

speech in furtherance of the charter school conversion was neither in accordance with nor in furtherance of her ordinary responsibilities. *Cf. D'Angelo v. Sch. Bd.*, 497 F.3d 1203, 1210 (11th Cir. 2007) (finding that principal's speech in furtherance of a charter school conversion was employee speech in part because there was no evidence that he was a teacher).

The School Board argues that Ramirez's speech is employee speech because, had she not been a School District employee, "it would have been unlikely that Plaintiffs would have ever had any involvement in the conversion effort, nor engaged in any speech related thereto." Def's Mot. at 13-14. However, the Supreme Court in *Lane* made quite plain that "the mere fact that a citizen's speech concerns information acquired by virtue of [her] public employment does not transform that speech into employee—rather than citizen—speech." 134 S. Ct. at 2379. While it is true that Ramirez may have never become involved in the conversion effort had she not been employed at Neva King, this premise does not categorically lead to the conclusion that her speech in furtherance of the conversion effort was employee speech. The Court thus concludes that her speech is citizen speech. Given that the School Board advanced no other First Amendment argument, the First Amendment analysis need not proceed further.

B. *Section 1983 Liability*

The School Board also contends—in an argument that now applies only to Ramirez—that even if any of the Plaintiffs could establish a First Amendment claim, they have failed to establish the School Board's liability for that claim under Section 1983. A school board's liability under Section 1983 may not be based on the doctrine of respondeat superior, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978), but rather only [sic] "only for acts for which [the School Board] is actually responsible," *Marsh v. Butler County*, 268 F.3d 1014, 1027 (11th Cir. 2001) (en banc). Ramirez has two methods through which she can establish the School Board's potential liability under Section 1983: "identify either (1) an officially promulgated [School Board] policy or (2) an unofficial custom or practice of the [School Board] shown through the repeated acts of a final policy maker for the [School Board]." *Grech v. Clayton County*, 335 F.3d 1326, 1329 (11th Cir. 2003). Because a school board rarely will have an officially adopted policy of permitting a particular constitutional violation, most plaintiffs—Ramirez here included—must show that the School Board has a custom or practice of permitting the constitutional violation and that the School Board's custom or practice is "the moving force [behind] the constitutional violation." *Id.* at 1330 (citations and internal quotation marks omitted). "To prove Section 1983 liability based on custom, a plaintiff must establish a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well

settled as to constitute a custom or usage with the force of law.'" *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1481 (11th Cir. 1991) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)) (citation and internal quotation marks omitted).

"Even in the absence of an express policy or custom, a local government body can be held liable 'for a single act or decision of a municipal official with final policymaking authority in the area of the act or decision.'" *Cuesta v. Sch. Bd.*, 285 F.3d 962, 968 (11th Cir. 2002) (quoting *McMillian v. Johnson*, 88 F.3d 1573, 1577 (11th Cir. 1996)); *see also K.M. v. Sch. Bd.*, 150 F. App'x 953, 957 (11th Cir. 2005) (per curiam) ("Florida law identifies the School Board as the policymaker for the School District. . . ."). Under a ratification theory, the School Board, "by actively endorsing or approving the conduct of its employees or officials, may be held responsible for it." *Garvie v. City of Fort Walton Beach*, 366 F.3d 1186, 1189 (11th Cir. 2004) (citation and internal quotation marks omitted). For Ramirez to maintain a claim against the School Board under this theory, she "must demonstrate that local government policymakers had an opportunity to review the subordinate [district official]'s decision and agreed with both the decision and the decision's basis." *Id.* (citation and internal quotation marks omitted).

The Plaintiffs proffer an affidavit by Tony Peterle, the father of a former Neva King student. After the Plaintiffs were removed from Neva King, Peterle appeared before the School Board at a meeting to describe the conversion attempt and the events leading

up to the Plaintiffs' removal. Peterle Aff. [ECF No. 59-4] ¶ 10. Following the meeting, he sent a letter to each member of the School Board, in which he outlined his "grave[ ] concern[s] about the actions of district administration" regarding the conversion attempt. Peterle Aff. Ex. D. He contended that the reassignment of the Plaintiffs, who "were all at the forefront of the charter conversion discussion," was "clearly related" to the alleged interference by School District officials. *Id.* He explained his view that Florida law ensures school administrators must support a valid charter request, so the Plaintiffs were "torn between promoting a discussion in the best interests of the profoundly disabled students in their care, and the orders (legal or not) of their superiors, under threat of losing their jobs and careers." *Id.* Further, he stated that the Plaintiffs' reassignment "sent a very clear message to the remaining staff at the school that discussion of conversion will result in punishment. . . . The statute also says that such reprisals are not permitted, but that doesn't seem to have stopped them from happening." *Id.* Following his appearance at the meeting and the sending of this letter, the School Board took no action. Peterle Aff. ¶ 12.

Peterle attests that he also attended a meeting with School Board member Dr. Marta Perez and School Board attorney Walter Harvey; he provided a contemporaneous email account of the events of that meeting, as well. *See* Peterle Aff. ¶ 13; *id.* Ex. E. At the meeting, Dr. Perez stated that the events at Neva King "looked like an example of the District's anti-charter bias," and

expressed that "the actions of the District were clearly against the law." *Id.* ¶ 13. Again, though, no action was taken.

The Court is persuaded that Ramirez has, sufficiently to withstand summary judgment, established the School Board's liability under a ratification theory. In cases in which courts found that a plaintiff had failed to establish liability under this theory, the record contained a clear lack of evidence. *See, e.g.*, *K.M.*, 150 F. App'x at 958 ("no evidence of any action—or even knowledge—by the Board itself"); *Sherrod v. Palm Beach Cnty. Sch. Dist.*, 424 F. Supp. 2d 1341, 1346 (S.D. Fla. 2006) ("no proof in the record that any member of the school board, much less a majority" agreed with the superintendent's allegedly impermissible retaliatory animus toward the plaintiff). That is not the case here. In the light most favorable to Ramirez, the record contains evidence which supports a finding of ratification: (1) Ramirez participated in the charter conversion effort; (2) School District officials removed her from Neva King; (3) Peterle appeared before the School Board and informed them of the underlying situation and Ramirez's unwarranted removal from Neva King; (4) Peterle sent letters to each School Board member further explaining the situation; and (5) the School Board did not act. Furthermore, Ramirez provides evidence that a School Board member, Dr. Perez, in the presence of the School Board's counsel, described the School District's actions against the Plaintiffs as clearly unlawful. The School Board seeks to rebut this last point by providing deposition testimony from

Dr. Perez in which she claims she had no personal knowledge or recollection of Peterle's allegations. However, a dispute regarding Peterle's factual account of his conversations with Dr. Perez and the School Board's attorney must be resolved at trial, not on a motion for summary judgment.

IV. CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** that the School Board's Motion for Summary Judgment [ECF No. 54] is **GRANTED** as to Plaintiff Alberto T. Fernandez and Plaintiff Henny Cristobol and **DENIED** as to Plaintiff Patricia Ramirez.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of June, 2017.

/s/ Darrin P. Gayles
DARRIN P. GAYLES
UNITED STATES
DISTRICT JUDGE

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ALBERTO T. FERNANDEZ,
HENNY CRISTOBOL, AND
PATRICIA E. RAMIREZ,

Petitioners,

vs. Case No. 13-1492

MIAMI-DADE COUNTY
SCHOOL BOARD,

Respondent.
/

RECOMMENDED ORDER

Administrative Law Judge Edward T. Bauer held a final hearing in this case in Miami, Florida, on January 27 through 31, 2014, and by video teleconference between sites in Miami, Tallahassee, and Lakeland, Florida, on February 14, 2014.

APPEARANCES

For Petitioners: Robin Gibson, Esquire
Amy U. Tully, Esquire
Gibson Law Firm
299 East Stuart Avenue
Lake Wales, Florida 33853

For Respondent: Luis M. Garcia, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue,
Suite 430
Miami, Florida 33132

STATEMENT OF THE ISSUES

Whether Respondent committed one or more acts of unlawful reprisal against Petitioners, contrary to section 1002.33(4)(a), Florida Statutes, and, if so, what relief should be granted.

PRELIMINARY STATEMENT

Beginning in May 2012 and over the course of the next few months, Dr. Alberto T. Fernandez, Henny Cristobol, and Patricia E. Ramirez (the Petitioners in this proceeding, all of whom are educators employed by the Miami-Dade County School Board) filed a series of formal complaints with the Florida Department of Education ("DOE") pursuant to section 1002.33(4)(a), Florida Statutes. The gravamen of the complaints was that Respondent Miami-Dade County School Board ("Respondent" or "MDCPS") committed acts of reprisal against Petitioners because of their involvement in the attempted conversion of Neva King Cooper Educational Center to a public charter school.

In response, DOE conducted an investigation into the allegations, which culminated in the issuance of a "Final Investigative Report" on November 16, 2012. DOE thereafter attempted, unsuccessfully, to conciliate Petitioners' complaints. Ultimately, on April 12, 2013, Dr. Tony Bennett, DOE's commissioner at that time, notified the parties that the investigation had been terminated; that, with respect to each Petitioner, DOE had "made a finding that reasonable grounds exist to believe that an unlawful reprisal has occurred, is

occurring, or is to be taken"; and that DOE had contracted with the Division of Administrative Hearings ("DOAH") to conduct a formal hearing.

Subsequently, on April 23, 2013, DOE forwarded Petitioners' complaints to DOAH for further proceedings. In an Order dated July 3, 2013, the undersigned granted Petitioners' unopposed requests to amend their complaints. Consistent with the relief requested, the Order of July 3 provided that this cause would proceed on Petitioner Alberto Fernandez' "Petition for Formal Hearing," filed May 7, 2013; Petitioner Henny Cristobol's "Petition for Formal Hearing," likewise filed May 7; and Petitioner Patricia Ramirez' "Petition for Formal Hearing," filed June 6, 2013.

As noted above, the final hearing was conducted on January 27 through 31 and February 14, 2014, during which Petitioners testified on their own behalf, presented the testimony of five other witnesses (William Detzner, Richard Massa, Ondina Rodriguez, Tebelio Diaz, and Tony Peterle), and introduced 42 exhibits into evidence, numbered 2 through 6; 7A; 7B; 8 through 31; and supplemental exhibits 1 through 11.[1] Respondent called four witnesses (Ava Goldman, Judith Marte, Ana Rasco, and Terry Chester) and introduced 26 exhibits, numbered 2 through 13; 16 through 22; 23A; 23B; and 24 through 28.

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[1] Petitioners' Supplemental Exhibits 1 and 2 (respectively, the deposition transcripts of Tracy McCrady and Richard Shine) were received in lieu of the witnesses' live testimony.

The final hearing Transcript was filed on April 14, 2014. At MDCPS' request, the deadline for the submission of proposed recommended orders was extended to May 30, 2014. Both parties timely filed proposed recommended orders, which the undersigned has considered.

Unless otherwise indicated, all rule and statutory references are to the 2012 versions.

FINDINGS OF FACT

I. Introduction

1. The instant proceeding implicates section 1002.33(4), Florida Statutes, which prohibits district school boards from taking certain acts of reprisal—disciplinary or corrective action, unfavorable transfers, and the like—against a school district employee because of his or her involvement with an application to establish a charter school. Petitioners contend that MDCPS violated this statutory proscription in multiple respects, most notably by transferring them to undesirable alternate assignments. Before delving into the particulars, however, a few words about Florida charter schools.

2. Through its enactment of section 1002.33, the Legislature made pellucid that charter schools "are public schools" that "shall be part of the state's program of public education." § 1002.33(1), Fla. Stat. Charter schools, which are intended to improve

academic achievement and increase learning opportunities for all students, take two forms: a "new" (i.e., a start-from-scratch) charter school; and, of particular relevance here, a "conversion charter school." § 1002.33(3)(a) & (b), Fla. Stat.

3. As a prerequisite to the conversion of an existing public school to a public charter school, an application must be presented to the district school board for its approval. *See* § 1002.33(3)(b), Fla. Stat. However, before such an application can be submitted, it must be demonstrated through a balloting process that the conversion is supported by "at least 50 percent of the teachers employed at the school and 50 percent of the parents voting whose children are enrolled at the school." *Id.*

4. Significantly, upon the initiation of the balloting process, which occurs at the written request of the principal, parents, teachers, the school advisory council, or the district school board, considerable responsibility is vested exclusively with the prospective conversion school and its *principal*—as opposed to the district school board. For instance, the principal is tasked with initiating the balloting within 60 days of the receipt of the written request, as well as ensuring that the process is completed at least 30 days before the charter application deadline, which falls on August 1 of each year. Fla. Admin. Code R. 6A-6.0787(1). Moreover, the school principal (or his or her designee) is charged with ensuring that only eligible persons vote and that no individual votes more than once. Fla. Admin. Code R. 6A-6.0787(2)(g). In addition, and as

mandated by Florida Administrative Code Rule 6A-6.0787(2)(e), the ballots are to be "created and distributed by the school." Finally, the principal is responsible for selecting, in conjunction with the applicant, an independent arbitrator to tally the teacher and parent ballots. Fla. Admin. Code R. 6A-6.0787(3)(a) & (b).

II. The Events

5. Against this backdrop, the undersigned turns to the event that, according to Petitioners, resulted in a series of unlawful acts of reprisal: the attempted conversion of Neva King Cooper Education Center ("NKCEC"), a public school operated by MDCPS.

6. In or around the summer of 2011, Petitioner Henny Cristobol ("Mr. Cristobol"), NKCEC's assistant principal at that time, was asked by an acquaintance if he would be interested in serving on the board of a Broward County charter school. During a subsequent conversation with the same individual, Mr. Cristobol learned, much to his surprise, that an existing public school could be converted into a public charter school.

7. His curiosity piqued, Mr. Cristobol investigated the pros and cons of charter schools and eventually concluded that, in light of NKCEC's unique characteristics, its students would benefit by a conversion. As explained during the final hearing, NKCEC is unusual in that it serves a small population of students (approximately 120) ranging in ages from three through twenty-two, all of whom receive special

education services by virtue of profound intellectual disabilities—that is, each student's IQ is less than 25.

8. During the fall of 2011, Mr. Cristobol introduced the idea of a conversion to NKCEC's principal, Petitioner Dr. Alberto Fernandez ("Dr. Fernandez"). As a 30-year veteran of MDCPS who appreciated the gravity of such a proposal, Dr. Fernandez concluded that additional research was necessary before the idea could be presented to NKCEC's Educational Excellence School Advisory Committee ("EESAC"). To that end, Dr. Fernandez requested and received assistance from three NKCEC employees: Petitioner Patricia Ramirez ("Ms. Ramirez"), a placement specialist who had been employed with MDCPS since 1998; Ondina Rodriguez, a program specialist; and Mr. Cristobol.

9. As 2011 wound to a close, Dr. Fernandez ultimately determined, based upon a review of the information gathered, that a conversion, although not without some risks, would be beneficial to NKCEC's students and faculty. However, Dr. Fernandez and Mr. Cristobol feared (presciently, as it turns out) that the prospective conversion would be met with strong resistance from MDCPS. Owing to this concern, Dr. Fernandez and Mr. Cristobol decided that the conversion effort should not be revealed to MDCPS unless and until NKCEC's EESAC called for a parent and faculty vote. Dr. Fernandez also thought it prudent to retain an attorney with charter school conversion experience—Mr. Robin Gibson, who represents each Petitioner in this proceeding—to ensure that, if initiated, the ballot and application process proceeded lawfully.

10. Thereafter, on February 2, 2012, Dr. Fernandez and Mr. Cristobol presented the conversion idea to NKCEC's EESAC. At the conclusion of the meeting, the EESAC, which comprised members of the faculty, parents, and other members of the community, voted unanimously to initiate the ballot process. The EESAC memorialized its decision in a letter to Dr. Fernandez, which he received on the same date.

11. Immediately following the EESAC vote, Dr. Fernandez telephoned his supervisor, Mr. Will Gordillo (at that time, MDCPS' district director for the department of special education), to inform him of the prospective conversion. Concerned by the news, Mr. Gordillo warned Dr. Fernandez, quite ominously, that "repercussions" would follow.[2]

12. The same afternoon, Dr. Fernandez convened a faculty meeting, during which the attendees were: informed of the EESAC vote; presented with objective information about charter schools and the conversion process; advised that a conversion would carry certain risks; and encouraged to respect the opinions[3] of others regarding the conversion's merits. Not surprisingly, a number of the faculty had questions, which were answered by Dr. Fernandez, Mr. Cristobol, and Mr. Gibson. Notably, Mr. Gibson's attendance at the behest of Dr. Fernandez was entirely consistent with MDCPS' school visitor policy:

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[2] Hr'g Tr. 88:4-9; 89:23-25.

[3] Hr'g Tr. 1277:11-17.

> 9150 – School Visitors
>
> Parents, other adult residents of the community, and interested educators are encouraged to visit schools.
>
> * * *
>
> Visitors Invited by Other Administrators
>
> Supervisory or administrative staff who have invited professional visitors may elect to receive the visitors whom they have invited, as well as other visitors who may have a mutual interest or area of competency.[4]

13. To ensure that any questions regarding the conversion were thoroughly addressed, Dr. Fernandez reconvened the faculty meeting early the following morning (February 3, 2012, a teacher planning day).[5] At approximately 9:30 a.m., prior to the meeting's conclusion, Dr. Fernandez learned that a "district" visitor was waiting in the front office. As Dr. Fernandez and Mr. Cristobol soon discovered, the visitor in question was Barbara Mendizabal, an MDCPS district regional director.

14. During the conversation that ensued, Ms. Mendizabal inquired as to why MDCPS had not learned of the prospective conversion earlier. In addition, Ms. Mendizabal repeatedly "reminded" Dr. Fernandez and Mr. Cristobol that they "were still school

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[4] Pet'r Ex. 17.

[5] Mr. Gibson was in attendance, once again, with Dr. Fernandez' authorization.

board employees"—a comment they construed, quite reasonably, as an oblique warning to stay in line.

15. As it happens, Ms. Mendizabal was not the only district-level employee to appear at NKCEC on February 3, 2012. Indeed, Dr. Fernandez also received visits from Milagros Fornell (the associate superintendent for curriculum, and a member of the superintendent's cabinet) and Valtena Brown (a region superintendent), neither of whom, to the best of Mr. Cristobol's knowledge, had ever before visited[6] NKCEC. Ms. Brown's conversation with Dr. Fernandez was unremarkable in that she simply directed him to convene a meeting with the parents to discuss the conversion process.

16. However, Ms. Fornell's exchange with Dr. Fernandez was considerably more eventful. In particular, Ms. Fornell informed Dr. Fernandez that she was not happy about the prospective conversion; "reminded" him that he was still an MDCPS employee; ordered him to schedule a faculty meeting for a later date; and advised him that, beginning immediately and pending the outcome of the ballot process, several district-level employees would be housed at NKCEC on a full-time basis, ostensibly to field questions from the faculty about the conversion. As detailed below, however, the presence of the district-level employees, which continued long after the conversion vote was ultimately aborted, served a far less benevolent purpose.

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[6] Hr'g Tr. 406-407.

17. Beginning on or about February 4, 2012, and continuing over the next three months, at least one district-level employee was present on NKCEC's campus—on most days, Ms. Ava Goldman, the administrative director of MDCPS' office of special education and educational services, and the person to whom Dr. Fernandez' supervisor, Mr. Gordillo, reported. Although Mr. Gordillo occasionally filled in for Ms. Goldman, the evidence demonstrates that one or both were present[7] for the entirety of each workday, and that Dr. Fernandez was under an ongoing obligation to provide them with all documents and communications relating to the conversion.[8]

18. Suffice it to say that, prior to February of 2012, Ms. Goldman and Mr. Gordillo's appearances on NKCEC's campus were rare; indeed, by Dr. Fernandez' reckoning, Mr. Gordillo generally visited an average of two or three times per year, while Ms. Goldman had only been to NKCEC on two occasions over the preceding two years.[9] It is hardly surprising, then, that a number of NKCEC's faculty were intimidated by Ms. Goldman and Mr. Gordillo's presence,[10] unease that

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[7] Hr'g Tr. 105:8-11.

[8] *See* Petitioner's Exhibit 4, the February 10, 2012, memorandum from Ms. Fornell to Dr. Fernandez.

[9] Hr'g Tr. 89-90.

[10] In particular, Ms. Ondina Rodriguez testified credibly that the constant presence of the district-level staff was both intimidating and uncomfortable. Hr'g Tr. at 1354:25-1355:1-7. Similarly, Mr. Tebelio Diaz, an art teacher who has been employed with MDCPS for more than 20 years, persuasively testified that many of NKCEC's faculty were "scared, confused, [and]

was exacerbated by the fact that the pair behaved more like sentries than members of high-level management whose purpose was to field inquiries. Indeed, the credible evidence demonstrates that, in lieu of answering questions[11] about the conversion, Ms. Goldman and Mr. Gordillo spent their days continually roaming the school's hallways, offices, and classrooms, all the while watching NKCEC's faculty.

19. If the ominous presence of Ms. Goldman and Mr. Gordillo failed to communicate the desired message—i.e., MDCPS' staunch opposition to the prospective conversion—any lingering doubts on that point were extinguished during the faculty meeting of February 7, 2012. The meeting was atypical, first, in that it was controlled by Ms. Fornell (as opposed to Dr. Fernandez), who announced to the faulty [sic] that a conversion was "not a good idea."[12] The meeting was also unusual in that it was attended by 12 to 15 district administrators, the majority of whom had never before visited NKCEC. Although MDCPS claims that the

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intimidated" by the presence of Ms. Goldman and Mr. Gordillo. Hr'g Tr. at 1381:12-16. Perhaps the most compelling testimony on this point came from Mr. William Detzner, a member of NKCEC's faculty since 1990, who offered credible testimony that the constant presence engendered an "atmosphere of very deep fear." Hr'g Tr. at 1284:11-14.

[11] The undersigned rejects Ms. Goldman's testimony that she fielded "a lot" of questions concerning the prospective conversion. Instead, the credible evidence demonstrates that Ms. Goldman and Mr. Gordillo rarely had occasion to field inquiries from NKCEC's faculty. Hr'g Tr. at 411:1-13; 554:6-21.

[12] Hr'g Tr. 100:20-21.

presence of each administrator was necessary to address the variety of issues at hand (retirement, health insurance, budget concerns, and so forth), the credible evidence demonstrates that not all of these individuals actually spoke.[13]

20. Tellingly, the administrators who did speak at the meeting offered a thoroughly one-sided and sometimes misleading assessment of the prospective conversion. Specifically, the faculty was told that, of the roughly 100 charter schools in Miami-Dade County, only one participated in the Florida Retirement System ("FRS"). MDCPS failed to mention, however, that all of Miami-Dade's existing charter schools are "start-up" charter schools (a very different animal than conversion schools, which comprise, at least initially, a number of existing FRS members), nor did it point out, until an NKCEC employee pressed the issue at the very end of the meeting, that section 1002.33(12)(i) expressly authorizes charter school participation in FRS.[14] Further, NKCEC's faculty members were advised that a conversion would necessarily result in the loss of their health insurance and other benefits.[15] Once again, however, MDCPS neglected to disclose that, even if converted, NKCEC could continue to offer such benefits to its employees.

21. As for the economic feasibility of the prospective conversion, MDCPS' chief budget officer, Ms.

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[13] Hr'g Tr. 1336:8-10.

[14] Hr'g Tr. 99:3-12; 264:3-19.

[15] Hr'g Tr. 99:13-21.

Judith Marte, informed the faculty that NKCEC would face an annual budget shortfall in excess of approximately $1.25 million, a figure MDCPS now admits was inflated. Although Petitioners and MDCPS quarrel about the extent to which the deficit was overstated (approximately $100,000 versus upwards of $1 million), the undersigned need not resolve this question, for the evidence demonstrates that Ms. Marte's presentation, albeit flawed, reflected an honest attempt on her part to furnish accurate budget information.

22. Ms. Marte's honesty notwithstanding, the faculty meeting of February 7, 2012, was plainly intended to convey MDCPS' stern disapproval of the prospective conversion. On this point, the undersigned is persuaded by the final hearing testimony of Mr. Richard Massa, a teacher with more than 30 years of experience, who credibly and aptly summed up the meeting as a "Pearl-Harbor like" bombardment of the negatives:

> A. No. What I disapproved of was 15 – I don't know the exact number, you know, maybe a dozen, maybe 18, but approximately 15 people coming in, never before coming around the school. . . . It's all like, if you do this, it's like – it's the wors[t] thing you could ever do to your life and the students. That's what I recall.
>
> So, you know, if you're asking me again, I'll stick to the two words I said; it was like Pearl Harbor. It was a blitzkrieg. I don't know how else to put it.

> Q. So they were just coming in like kamikazes at the meeting?
>
> A. You think it's funny? I don't. They were.[16]

23. A parent information session was held some nine days later, a proceeding that was dominated, once again, by MDCPS administrators. Similar to the faculty meeting of February 7, 2012, the session's overall theme was clear: the conversion of NKCEC was a foolhardy and doomed endeavor. As a flourish to MDCPS' presentation, the parents were addressed by the former operator of a now-defunct charter school, who proceeded to describe his experiences relating to the institution's closing.[17] Apparently frustrated with the one-sided nature of the session, one parent eventually rose from her seat and implored the MDCPS administrators to permit Dr. Fernandez to speak.[18] Only at that point, and with Mr. Gordillo's approval, was Dr. Fernandez afforded a brief opportunity to address the parents.

24. Before proceeding further, it is well to note that, during the preceding 14 academic years (i.e., 1998

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[16] Hr'g Tr. 1334:13-1335:6.

[17] Hr'g Tr. 102:5-11.

[18] Mr. Cristobol credibly described the parent's remarks as follows:

> And then there was another parent, Ms. Bundukamara, who literally stood up and said, "I know Dr. Fernandez real well, and I know he's not crazy. And if he thinks this is a good idea, I would like to hear what he has to say about it."

Hr'g Tr. 423:13-17.

until the prospective conversion), Dr. Fernandez' supervisors had always assessed his performance as either "distinguished" or "exemplary," the two highest ratings awarded by MDCPS. For this reason, Dr. Fernandez was dismayed to receive, on February 29, 2012, a "memorandum of professional responsibilities" from Mr. Gordillo. In the memorandum, Mr. Gordillo indicated that he had not been provided with advance notice of Dr. Fernandez' absence from NKCEC on February 28, 2012, and "reminded" Dr. Fernandez of his professional obligation to provide such notification.

25. In his written response to Mr. Gordillo, Dr. Fernandez credibly explained that he had, in fact, furnished prior notice of his absence to both him (Mr. Gordillo) and Ms. Goldman. Dr. Fernandez also lamented the unusual and sudden change in their longstanding professional relationship:

> Lastly, you and I have always been able to communicate openly and personally, without the need for a memorandum like the one I received. In the past, you have always communicated with me either in person, over the phone, or via email whenever you needed me to do something related to my professional responsibilities. You have been my immediate supervisor for over 14 years cumulative. The above-mentioned memorandum represents the first time you have ever given me a memorandum reminding me of my professional responsibilities.[19]

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[19] Resp't Ex. 6, p. 292.

26. This letter to Mr. Gordillo was not the only correspondence Dr. Fernandez had occasion to write during the weeks preceding the scheduled conversion vote. Indeed, on March 19, 2012, Dr. Fernandez sent a memorandum to Ms. Marte (as noted previously, MCDPS' chief budget officer) that requested, among other things, additional information concerning the revenues NKCEC generated during the previous school year. The correspondence read, in pertinent part:

> [W]e are in the process of finalizing a charter school conversion budget for our teachers and parents to review. However, we need more information. We would like to know what revenues our school both *generated and received during the 2010-2011 school year* that were not addressed in [Ms. Marte's memorandum of February 14, 2012] and/or were not discussed in the telephone conference of February 27, 2012. . . . These revenues may include, but are not limited to, Medicaid reimbursement; Title II; Title III; Food Service funds; and Capital Outlay revenues, including Capital Outlay and Debt Service funds, funds generated by the Local Optional [Millage] tax, and any other maintenance funds to which our school is entitled. We would also like to kindly ask that you provide us with the amount of funds we could receive if our school was able to participate in the Performance Pay Plan as a charter school. Additionally, we kindly request that you provide us with any other operational costs that were not

> discussed in the aforementioned conference call and/or were not mentioned in your memorandum of February 14, 2012.
>
> Our intention for the above-mentioned requests is to make sure that we have all of the revenues and expenses when projecting a budget for [NKCEC's] conversion charter school operation, should the process for conversion charter school status continue. . . . *We would like to have this information a reasonable time before the teachers and parents vote for approval to continue with the application for charter school status. This vote will take place the week of April 9, 2012.*
>
> Additionally, members of our [EESAC] and other staff have requested information about grant allocations to our school. I am in a position to provide some, but not all, of the information. We have provided the EESAC and staff with the information we know about, but, we need to take you up on your invitation to assist us so we can provide the rest of it.

(emphasis added).

27. More than two weeks later, and a mere four school days before the conversion vote was scheduled to commence, Ms. Marte furnished a written response that addressed some, but not all, of Dr. Fernandez' questions. In particular, Ms. Marte reiterated MDCPS' (likely erroneous[20]) position that, "[u]nder [the

[20] *See* 20 U.S.C. § 7221e(a) ("For purposes of the allocation to schools by the States or their agencies of funds under part A of subchapter I of this chapter, and any other Federal funds which

Individuals with Disabilities Education Act], Title II and Title III, as a charter school [NKCEC] would be eligible for services and would not receive an allocation." Ms. Marte's correspondence further opined that, because MDCPS was not expected to receive Public Education Capital Outlay ("PECO") funds during the next fiscal year, NKCEC "would not be eligible for PECO dollars." Notably, however, Ms. Marte did not detail all of the revenue NKCEC *generated* for MDCPS, nor did she furnish the requested information concerning performance pay funds, the available grant allocations, or the total amount of Medicaid reimbursement associated with NKCEC for the 2010-2011 school year.

28. On March 28, 2012, one week before he received the response detailed above, Dr. Fernandez concluded that the lack of complete budget information—as well as unanswered questions regarding the alternative arrangements, if any, that would be made for current employees who did not wish to remain at NKCEC, if converted—necessitated a postponement of the conversion vote. In an e-mail to Ms. Goldman sent the same date, Dr. Fernandez explained his concerns and requested a brief delay of the voting, which was scheduled to commence on April 9, 2012. Two days

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the Secretary allocates to the states on a formula basis, the Secretary and each State educational agency shall take such measures as are necessary to ensure that every charter school receives the Federal funding for which the charter school is eligible not later than five months after the charter school first opens. . . .")

later, on March 30, 2012, Ms. Goldman replied as follows:

> You need to do what you think is the right thing to do and what is in the best interest of the school and the students.
>
> Furthermore, the district does not object to less than 30 day renoticing of parents and teachers on the new vote date.[21]

29. Notwithstanding Ms. Goldman's unequivocal representation of no objection (on behalf of "the district") to a brief postponement, Dr. Fernandez thereafter received a memorandum dated April 3, 2012, which directed him to proceed with the vote as originally scheduled. Authored by Ms. Fornell, a member of the superintendent's cabinet, the memorandum was peculiar in that it omitted any mention of Ms. Goldman's earlier agreement to a delay. Also noteworthy was that the memorandum represented a blatant usurpation of Dr. Fernandez' control over the voting, for as discussed earlier, Florida Administrative Code Rule 6A-6.0787(1) instructs that the school principal—and only the school principal—is responsible for the initiation and completion of the ballot process. Ironically, Ms. Fornell's memorandum also implied that the voting process itself, as opposed to the foreboding presence of Ms. Goldman and Mr. Gordillo, was responsible for "disruption" at NKCEC:

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[21] Pet'r Ex. 5; Hr'g Tr. 107:20-23.

> The purpose of this memorandum is to respond to your March 28, 2012, request to postpone the charter school voting process, which was officially noticed to parents and faculty on March 6, 2012. Your request has been reviewed by the appropriate administrators and the Office of the School Board Attorney. In order to prevent further disruption, it has been determined that, in the best interest of [NKCEC] students, parents, and faculty, the voting process begin on April 9, 2012, as originally scheduled.

30. Owing to MDCPS' sudden, inexplicable, and last-minute change in position regarding a postponement, Dr. Fernandez reasonably concluded that insufficient time remained to furnish the parents and faculty with the accurate and objective information they needed to cast informed votes.[22] As such, Dr. Fernandez conferred with Ms. Getchell, the EESAC chairperson, who rescinded the request for a conversion vote in a letter dated April 4, 2012.[23]

31. Dissatisfied with the sudden turn of events, Mr. Tony Peterle, the parent of a NKCEC student, thereafter submitted a written request to reinitiate the ballot process. MDCPS' copy of the request, which was e-mailed to Dr. Fernandez and the superintendent on April 17, 2012, included the names and signatures of two other NKCEC parents, both of whom affirmed that they "agree[d] with Mr. Peterle and would like to

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[22] Hr'g Tr. at 108:19-23.

[23] Dr. Fernandez drafted the letter on Ms. Getchell's behalf.

investigate the options with charter school conversion at NKCEC."[24]

32. Subsequently, on April 18, 2012, Ms. Goldman notified Dr. Fernandez by e-mail (with a courtesy copy provided to Ms. Fornell) that Mr. Peterle's letter was "insufficient" to initiate the charter school conversion process. The very same day, Ms. Fornell filed complaints against Dr. Fernandez and Mr. Cristobol with MDCPS' Incident Review Team. The complaints, which were virtually identical, alleged that Dr. Fernandez and Mr. Cristobol:

> [U]sed position of authority to intimidate and coerce staff to support and influence the outcome of the vote for the proposed charter school conversion. Employee[s] inappropriately used time and resources to facilitate the charter school conversion process. Employee[s] arranged for an individual [i.e., Mr. Gibson] not properly authorized to come onto school grounds to address faculty and EESAC in support of charter school conversion.

33. The ensuing investigation and its outcome are detailed shortly; first, though, a brief discussion of MDCPS' Personnel Investigative Model ("PIM") is necessary. Adopted in 2004, the PIM details the procedures by which administrators, worksite supervisors, and principals should address incidents of misconduct. For instance, and of particular importance here, the PIM instructs that, prior to reporting an incident, the

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[24] Resp't Ex. 6, p. 505.

"administrator, principal, or worksite supervisor . . . shall make a determination as to whether the incident is one that can and should be competently and comprehensively addressed at the worksite." In making such a determination, the PIM admonishes that "[a]dministrators throughout the district are expected to address issues and/or conflicts at the worksite." According to the PIM, issues that "***SHOULD***" (the italics, bold type, and all caps appear in the original) be addressed at the worksite include, among others, the misuse of district time, technology, or equipment, as well as minor violations of the Code of Ethics—the very sort of allegations leveled against Dr. Fernandez and Mr. Cristobol. The PIM provides, further, that only when an issue "cannot or should not be addressed at the worksite" should it be "reported to the Incident Review Team" ("IRT").

34. Upon its receipt of a report of misconduct, the IRT must review the allegations to determine if criminal behavior is implicated; if so, the matter is forwarded to MDCPS' General Investigative Unit. If not, the PIM authorizes the IRT to take one of three actions: refer the matter back to the worksite for resolution without an investigation; allow an administrator to conduct an investigation—a procedure known as an "Administrative Review"; or, in cases involving "serious noncriminal incidents of misconduct,"[25] assign the matter to the Civilian Investigative Unit ("CIU"), which is expected, absent "unusual circumstances," to

[25] The PIM defines the CIU as the "entity assigned to investigate serious non-criminal incidents of misconduct made against MDCPS personnel." Pet'r Ex.7, p. 8.

conduct an investigation and "forward[] a completed investigative report, including a determination of Probable Cause, No Probable Cause, or Unfounded to [the Office of Professional Standards] within thirty (30) business days[] from date of assignment by the IRT." If probable cause is found, the Office of Professional Standards ("OPS") must convene the Disciplinary Review Team, which formulates a proposed disciplinary action. Finally, the PIM contemplates that the entire process—i.e., from the date of the incident to the imposition of discipline—should be completed within 60 work days.

35. Returning to the facts at hand, Ms. Fornell submitted her complaints concerning Dr. Fernandez and Mr. Cristobol with the IRT on April 18, 2012. Electing to treat the allegations as "serious non-criminal conduct," as opposed to issues that could be resolved at the worksite, the IRT transferred the cases to the CIU on the same date. Mr. Julio Miranda, the head of the CIU, immediately assigned the investigations to Ms. Terry Chester and, two days later, notified Dr. Fernandez and Mr. Cristobol that they had been named as subjects in a personnel matter.

36. Shortly after receiving the investigative assignment, Ms. Chester selected approximately 30 individuals (NKCEC faculty, staff, and a few parents) to interview regarding the allegations. Although Ms. Chester eventually mailed letters to each of the witnesses requesting their cooperation, the first such

notice[26] was sent on April 24, 2012, to NKCEC's custodian, Mr. Leroy Dixon. (An odd place to begin an investigation into allegations of voter intimidation and coercion, as Mr. Dixon, a non-teacher, was *ineligible* to cast a ballot.) Not surprisingly, Mr. Dixon's interview responses revealed no evidence of coercion or any other wrongdoing on the part of Dr. Fernandez and Mr. Cristobol.

37. As for the balance of the witnesses, the record reflects that Ms. Chester's letters requesting their cooperation were not mailed until Thursday, April 26, 2012 (or later),[27] more than a week after she was assigned the investigation, and two days after the solitary letter to Mr. Dixon. In pertinent part, the letters read:

> Please be advised that Terri A. Chester, Investigator, within the [CIU] for [MDCPS] has been assigned the responsibility of investigating the allegation that Mr. Henny Cristobol, Assistant Principal, and Dr. Alberto Fernandez, Principal, [NKCEC] *may* have violated School Board Policy 3210, Standards of Ethical Conduct, School Board Policy 3210.01, Code of Ethics, School Board Policy 7540.04, Staff Network and Internet Acceptable Use and Safety, and School Board Policy 7540.05, Staff Electronic Mail.

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[26] Resp't Ex. 6, p. 158.

[27] Resp't Ex. 6, pp. 68; 74; 77; 83; 89; 95; 101; 108; 111; 118; 121; 128; 134; 137; 144; 147; 150; 152; 165; 171; 177.

> You have been identified as a person who may have relevant information that could be used to establish some of the facts of this investigation. With your permission only, CIU is requesting your consent to be interviewed regarding the allegation listed above in order to complete a thorough and fair examination of the facts. It is our hope that you will agree to be interviewed regarding the above referenced matter.
>
> *It should be noted that you have the right to decline this request*. However, please understand that the [CIU] has a duty to continue the investigation and make a fair and objective determination with or without the opportunity to have an interview with you. . . .
>
> As this is an open investigation, no other information can be provided at this time. It must be noted that you are advised not to contact any subject(s) or witnesses, with the intent to interfere with this investigation.

(emphasis in original).

38. Thereafter, on April 30 or May 1, 2012, *just two or three business days*, respectively, after the foregoing letters were *mailed*, the head of the CIU, Mr. Miranda, requested that OPS transfer Dr. Fernandez and Mr. Cristobol to alternative assignments. Ms. Chester's explanation, which the undersigned discredits, is that Mr. Miranda made the request after she informed him that the NKCEC faculty members were

not cooperating. By contrast, Mr. Miranda claims,[28] likewise incredibly, that he requested the transfers because "information regarding the investigation was spreading amongst NKCEC employees"—activity that should hardly have been surprising given the numerous letters his subordinate, Ms. Chester, had disseminated to NKCEC's faculty and staff.

39. Nevertheless, on May 2, 2012, OPS relocated Dr. Fernandez to "Stores and Mail Distribution," where he would remain for more than a year, while Mr. Cristobol was reassigned to MDCPS' "Department of Transportation, Vehicle Maintenance." (Dr. Fernandez and Mr. Cristobol's experiences during their alternate assignments are detailed later in this order.) On the same date, Ms. Fornell assumed the role as NKCEC's site administrator.

40. In light of MDCPS' concession[29] that the charges did not involve a threat to the health, safety, or welfare of NKCEC's students or employees, the transfers of Dr. Fernandez and Mr. Cristobol were conspicuously at odds[30] with its "Alternate Assignments" policy, which reads:

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[28] Mr. Miranda's explanation in this regard, which the undersigned discredits, is documented in DOE's fact-finding report. Resp't Ex. 9, p. 36; Pet'r Ex. 14. The DOE report, admissible pursuant to section 1002.33(4)(a)4., has been used solely to evaluate the consistency of MDCPS' explanations regarding Petitioners' transfers.

[29] Hr'g Tr. 873:21-874:7.

[30] MDCPS contends that the policy's reference to "health, safety, and welfare" is illustrative, not exhaustive. This

> Alternate assignments are considered exclusively when an allegation made is serious enough in nature to warrant the removal of an employee from the site to an alternate assignment until the resolution of the case (i.e. those that the health, safety, and welfare of students and/or employees may be affected).

41. During the ensuing weeks, Ms. Chester continued with her investigation, questioning a number of witnesses and conducting an examination of Dr. Fernandez and Mr. Cristobol's computer usage and e-mail activity. Ms. Chester discovered that, during the months preceding the aborted vote, Dr. Fernandez and Mr. Cristobol had utilized MDCPS computers and e-mail to conduct research and communicate regarding the prospective conversion. She also learned that Mr. Gibson had been present, with Dr. Fernandez'

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interpretation is patently unreasonable, however, for the policy expressly provides that "[a]lternate assignments are considered *exclusively* when an allegation is serious enough in nature to warrant removal . . . (*i.e.* those that the health, safety, and welfare of students and/or employees may be affected)." (Emphasis added). The short form of the Latin "*id est*," "i.e." means "that is to say." *Black's Law Dictionary* 746 (6th ed. 1990). In other words, "i.e." is not the same as "e.g."—the abbreviation for *exempli gratia*, which means "for the sake of an example." *Id.* at 515; *see also United States v. King*, 849 F.2d 1259, 1260 (9th Cir. 1988) (explaining that the "abbreviation i.e. . . . introduces another way . . . of putting what has already been said. It does not introduce an example") (internal quotation makes [sic] omitted). Concluding that the language means what it says and that MDCPS understands what it means, the undersigned discredits the testimony that the policy has been routinely applied to employees whose alleged misconduct did not present a danger to the health, safety, and welfare of students or employees.

authorization, during the faculty meetings of February 2 and 3, 2012.

42. Neither of these findings was remarkable or indicative of wrongdoing, for, as discussed previously, school principals are charged with initiating the ballot process, determining the eligibility of voters, creating and distributing ballots, and providing information to teachers and parents. *See* Fla. Admin. Code R. 6A-6.0787. As for Mr. Gibson's presence at the meetings, MDCPS policy 9150 expressly authorized Dr. Fernandez to invite and receive professional visitors.

43. More problematic, however, was Ms. Chester's conclusion that Dr. Fernandez and Mr. Cristobol had attempted to coerce NKCEC employees into voting for the conversion. On this issue, Ms. Chester's investigative reports read:

> Randomly selected employees, parents and EESAC members were selected for interviews regarding this allegation. Employees interviewed indicated that they were approached and/or coerced by Dr. Fernandez during school hours to vote to convert the school to a charter conversion. Not all employees felt coerced; however, several did feel coerced and they felt singled out.
>
> * * *
>
> Randomly selected employees, parents and EESAC members were selected for interviews regarding this allegation. Employees interviewed indicated that they were approached, coerced, and asked to trust the administration

> about this decision by Mr. Cristobol during school hours to vote to convert the school into a charter conversion. Not all employees felt coerced; however, several did feel coerced.

44. Notably, the instant record includes the typed statements of each witness interviewed by Ms. Chester. Having undertaken a painstaking review of these materials, the undersigned finds no evidence of coercion or intimidation, as those terms are commonly understood.[31] Perhaps this is because, as revealed during the final hearing, Ms. Chester purports to equate the very distinct concepts of persuasion and coercion:

> ADMINISTRATIVE LAW JUDGE: You say that it was your conclusion that some employees felt they had been coerced. What was – how did it get to the point where it was beyond persuasion? In what way were they coerced?

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[31] Of the litany of NKCEC employees and parents interviewed by Ms. Chester, only two provided information that even remotely warrants discussion. The first, Mary Surca, recounted that, on one occasion, Mr. Cristobol informed her that he could not locate a copy of her lesson plans; later, during the same conversation, Mr. Cristobol "discussed" the prospective conversion. Resp't Ex. 6 at 125. Notably, however, Ms. Surca did not indicate that she felt coerced, intimidated, or otherwise mistreated. *Id.* at 124-26. The other witness, Melissa Placido, advised that, during one of the faculty meetings convened to discuss the conversion, Dr. Fernandez identified her as the teacher with the least seniority at NKCEC—a fact Dr. Fernandez mentioned while expressing his opinion that a conversion would afford NKCEC employees greater job security. *Id.* at 161. Once again, though, there is absolutely no suggestion that the witness interpreted these comments as acts of intimidation or coercion. *Id.* at 160-62.

> THE WITNESS: I'm using those two words together.
>
> ADMINISTRATIVE LAW JUDGE: Persuasion – they're synonymous?
>
> THE WITNESS: Correct.

45. As a result of Ms. Chester's conflation of these terms, the NKCEC parents and staff were never asked about coercion or intimidation—the principal allegations of Ms. Fornell's complaints against Dr. Fernandez and Mr. Cristobol. Instead, Ms. Chester merely inquired of the witnesses as follows:

> Were you *persuaded* by either Mr. Cristobol or Dr. Fernandez to vote to convert [NKCEC] to a charter school? If so, please explain.
>
> Have you ever been *approached* by [Dr. Fernandez/ Mr. Cristobol] about converting [NKCEC] into a charter school? If yes, please tell me what occurred.
>
> Are you aware of Dr. Fernandez or Mr. Cristobol *asking* parents or staff members to vote a certain way to convert the school to a charter school?

(emphasis added).[32] Notably, the *only* person Ms. Chester asked about "intimidation" or "coercion" was *Ms.*

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[32] Resp't Ex. 6, pp. 64-65; 71-72; 80-81; 86-87; 92-93; 98-99; 104-105; 114-115; 124-125; 131-132; 140-141; 155-156; 161-162; 168-169; 174-175.

Goldman, whose statement was obtained more than a month after those of the other witnesses.[33]

46. Having listened to several hours of testimony from Ms. Chester, who presented as an educated and articulate witness, the undersigned is convinced that she was fully aware of the distinction between persuasion and coercion and, moreover, that her conflation of these terms (with each witness save for Ms. Goldman) was consistent with an attempt by MDCPS to create an air of legitimacy for the illegitimate reassignments. Consider the final section of Ms. Chester's investigative report:

> Converting [NKCEC] into a charter conversion school was not a part of [Dr. Fernandez/Mr. Cristobol's] official duties.
>
> [Dr. Fernandez/Mr. Cristobol were] expected to ensure that the curriculum was followed, that the school was run in an efficient and safe manner and that the students' needs were met. [Dr. Fernandez/Mr. Cristobol] failed to meet these expectations when the school was *rated an "F" by plant operations*, the curriculum was not followed, the teachers were not teaching according to the *access points* outlined by the District, and students had *not*

[33] Ms. Goldman's statement reflects that she never personally witnessed any instances of intimidation or coercion on the part of Dr. Fernandez or Mr. Cristobol. Resp't Ex. 6, p. 45. This did not prevent her from alleging, incredibly, that "many teachers and staff"—none of whom she identifies—"came to [her] stating that they were intimidated and felt coerced." *Id.*

> *received grades* nor were the teachers using the *electronic gradebook*.

(emphasis added).

47. To be sure, these are potentially serious issues. As it happens, though, the concerns relating to student grading, curriculum, and the use of the electronic gradebook were completely unfounded, while the plant operations grade was dubious at best. Beginning with the question of student grades, it is true that NKCEC's students were not receiving letter grades and that Ms. Goldman informed Ms. Chester as much. However, the credible evidence demonstrates that NKCEC students had been receiving progress reports in lieu of grades since 1998—some 14 years—with Mr. Gordillo's knowledge and assent.[34] (The reader is reminded that Mr. Gordillo, Dr. Fernandez' supervisor, reported directly to Ms. Goldman.) For this reason alone, the undersigned rejects Ms. Goldman's assertion that she had no knowledge of NKCEC's use of progress reports.

48. As for Ms. Chester's finding (based on a statement from Ms. Goldman) that NKCEC teachers were not using MDCPS' "electronic gradebook," the credible evidence reveals, once again, that the practice had been occurring with Mr. Gordillo's permission for quite some time. This is reflected in an e-mail from Mr. Gordillo to Dr. Fernandez (and others) dated August 9, 2007, which reads:

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[34] Hr'g Tr. 234-235; 677:6-16.

> I asked both the principals of Merrick Educational Center and [NKCEC] to provide me feedback on this matter and we all agree that these schools should not be saddled with the constraints of electronic Gradebook given their extenuating circumstances. . . . Ms. Wehking clearly articulates some of the difficulties these schools experience if they are required to implement the electronic gradebook. Should you have any questions, please contact this office.[35]

49. With respect to the question of curriculum, Dr. Fernandez' persuasive testimony demonstrates that, contrary to Ms. Goldman's assertion, NKCEC faculty had been teaching "access points" since 2011:

> There are what we call access points. These access points are watered – I don't want to say watered down, but they are developed so that students with the most severe disability can access the general education curriculum. My conversation with Mr. Gordillo was, well, our students really – we cannot deny them the opportunity to access the general education curriculum, but this is not appropriate. He felt that we had to do it, and we did it. And I explained it to the staff.[36]

50. Turning to the issue of NKCEC's cleanliness, the evidence establishes that, on May 2, 2012 (within hours of Dr. Fernandez and Mr. Cristobol's involuntary

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[35] Pet'r Supp'l Ex. 5.

[36] Hr'g Tr. 671:6-14.

transfers), members of MDCPS' Department of Plant Operations conducted a "cleaning and sanitation audit." Respondent seeks to buttress the audit's results, which rated 76 percent of NKCEC's facility as "unsatisfactory," with the testimony of Ms. Goldman, who asserts that NKCEC was so filthy that it was necessary to disinfect each classroom with "germicide."[37] In rejecting this bleak portrait of NKCEC, the undersigned notes, first, that the 76 percent "unsatisfactory" rating clashes sharply with the inspection results that immediately preceded the request for a conversion vote: 94 percent "satisfactory" or "very good" on May 18, 2011; and 90 percent "satisfactory" on January 4, 2010.[38] Moreover, it is critical to recall that Ms. Goldman was stationed at NKCEC's campus, purportedly to answer questions, on a daily basis from February 2, 2012, until May 2, 2012, the date of the audit. As such, MDCPS' version of events would require the undersigned to believe, incredibly, that Ms. Goldman, who insists that she took no action to prompt an inspection,[39] stood idly by—for some three months—in the face of unsanitary and hazardous conditions.[40]

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[37] Hr'g Tr. 712:12-14.

[38] Pet'r Supp'l Ex. 8.

[39] Hr'g Tr. 715:4-8; 715:18-21.

[40] The photographs taken on the date of the inspection (found in Respondent's Exhibit 12) reveal nothing more than cluttered storage rooms, occasional instances of disarray about the outer grounds, and—hardly surprising given MDCPS' $1.8 billion maintenance backlog—a campus in need of repair. Hr'g Tr. 956:15-16. The short of it is that photographs, none of which depicts any area recognizable as a classroom, fail to corroborate

51. The investigation's lack of evenhandedness, although readily apparent at this point, is further exemplified by MDCPS' bizarre assertion that Dr. Fernandez and Mr. Cristobol were ethically barred from utilizing *any* worksite time or resources vis-à-vis the prospective conversion. Ms. Chester posited as much throughout her investigative report, and again during her final hearing testimony:

> THE WITNESS: During school hours, they were supposed to operate the school. They were supposed to facilitate teaching and learning in that environment, not to be working on charter conversion.
>
> * * *
>
> I said that their responsibility during the day was to be the principal and assistant principal. And their responsibility during the day was not to work on charter conversion. And that's, in fact, what was occurring.[41]

This position is plainly at odds with Florida Administrative Code Rule 6A-6.0787, which *obligates* the principal, as the school administrator, to initiate and complete the ballot process in a timely manner; create and distribute ballots; confirm the eligibility of voters; and select an independent arbitrator to tally the votes—activities no reasonable person would expect (or require) a principal to carry out during evening or

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Ms. Goldman's claim that the interior of NKCEC posed a sanitation hazard.

[41] Hr'g Tr. 878:11-15; 879:6-10.

weekend hours. Ironically, MDCPS' position is also inconsistent with its own actions: namely, the multiple-month assignments of Ms. Goldman and Mr. Gordillo (neither of whose professional duties related to charter schools) to NKCEC's campus, ostensibly to field questions and educate the faculty about the ramifications of a conversion.

52. The short of it is that MDCPS' investigation[42] yielded no evidence that would plausibly support Ms. Fornell's charges. Nevertheless, on June 22, 2012, Mr.

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[42] Ms. Chester's report is also critical of Dr. Fernandez for his occasional use of a school computer in connection with his volunteer work as a youth judo instructor. Notably, however, MDCPS policy expressly provides that "[p]ersonal use of the District's Network, including e-mail and Internet, is permitted as long as it does not interfere with an employee's duties, a student's learning activities and/or system operations. . . ." Resp't Ex. 4.

The CIU investigation also concluded that Dr. Fernandez behaved "unethically" by fielding inquiries from an attorney who had filed a complaint with the United States Department of Education's Office for Civil Rights on behalf of an NKCEC parent. (As best the undersigned can tell, the complaint alleged that MDCPS was discriminating against NKCEC's students, all of whom are disabled, by depriving them of the funding and staffing to which they were entitled.) Although it is possible that the *attorney* committed misconduct by contacting Dr. Fernandez directly (instead of through MDCPS counsel), it does not follow that *Dr. Fernandez* was ethically prohibited from communicating with the attorney. In fact, had he so desired, Dr. Fernandez could have personally filed the complaint on behalf of NKCEC's students. *See* 34 C.F.R. § 100.7(b) ("*Any person* who believes himself *or any specific class of individuals* to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official . . . a written complaint") (emphasis added).

Miranda notified Dr. Fernandez and Mr. Cristobol that there was probable cause to believe that they had violated "School Board Policy 8210, Standards of Ethical Conduct, School Board Policy 3210.01, Code of Ethics, School Board Policy 7540.04, Staff Network and Internet Acceptable Use and Safety, and School Board Policy 7540.05, Staff Electronic Mail."

53. The consequences of the probable cause findings are detailed shortly. First, it is necessary to shift the narrative to the third Petitioner, Ms. Ramirez. As noted previously, Ms. Ramirez and a fellow colleague, Ms. Rodriguez, conducted research at Dr. Fernandez' behest regarding charter school conversions. It is undisputed that much or all of Ms. Ramirez and Ms. Rodriguez' research activities, which were comparable[43] in scope and duration, occurred during school hours and with the use of NKCEC computers. Ms. Ramirez and Ms. Rodriguez were also similarly situated in that the research efforts did not impair their work performance. There was, however, a distinction between the two: Ms. Ramirez' husband, a certified public accountant, agreed to review—at no charge, and at the request of Dr. Fernandez—NKCEC's budget information to determine if a conversion would be economically feasible; Ms. Rodriguez' husband, by contrast, had no involvement with the prospective conversion.

54. Although the record is less than explicit, it appears that Ms. Chester learned of Ms. Ramirez and

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[43] Hr'g Tr. 540:23-541:14; 545:8-9.

Ms. Rodriguez' charter research, as well as the informal involvement of Ms. Ramirez' husband, within a day or so of Dr. Fernandez and Mr. Cristobol's reassignments. Immediately thereafter, on Friday, May 4, 2012, Ms. Fornell filed a complaint asserting that Ms. Ramirez had "used site resources and time to conduct non-school related activities"; significantly, no such allegations were lodged against Ms. Rodriguez. Upon reporting to work the following Monday, Ms. Ramirez was informed by Ms. Goldman that she was being reassigned, effective immediately, to MDCPS' Federal and State Compliance Office. Ms. Goldman then proceeded to escort Ms. Ramirez unceremoniously through NKCEC's back gate.

55. During the final hearing in this cause, Ms. Chester initially denied any knowledge of the reason for Ms. Ramirez' transfer:

> Q. And do you know what the reason was to determine – I know you don't do it, but was it ever conveyed to you as to why Mrs. Ramirez had to be removed from the school?
>
> A. It was not conveyed to me.[44]

When recalled to testify some two weeks later, Ms. Chester opined that the reassignment was not prompted by the informal involvement of Ms. Ramirez' spouse in the conversion process but, rather, by "concern" that Ms. Ramirez might relay to Dr. Fernandez

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[44] Hr'g Tr. 888:25-889:1-4.

and Mr. Cristobol the identities of the witnesses who had been selected for interviews.

56. Ms. Chester's explanation, which the undersigned discredits, is notably inconsistent with certain admissions by Mr. Miranda to the Florida Department of Education ("DOE") during its independent investigation of Petitioners' reprisal complaints. In pertinent part, DOE's investigative report reads:

> When asked why Patricia Ramirez was included in the investigation when other staff members at NKCEC were also clearly utilizing District resources to research and communicate about the charter conversion process[,] Miranda commented that Ramirez was investigated and reassigned because "she sent hundreds of e-mails from her NKCEC e-mail account, plus her husband, Carlos, a CPA, was consulting for NKCEC regarding the charter conversion."[45]

57. In any event, MDCPS has conceded that Ms. Ramirez' reassignment, as with the transfers of Dr. Fernandez and Mr. Cristobol, was unrelated to any concern for the health, safety, and welfare of NKCEC's students or faculty. This blatant departure from MDCPS' "Alternate Assignments" policy, buttressed by the events detailed earlier in this order, furnishes strong evidence that Petitioners' involuntary transfers would not have occurred but for their involvement in the conversion process.

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[45] Resp't Ex. 9, p. 36; Pet'r Ex. 14

58. As will be seen, Petitioners' paths diverged markedly following their transfers to the alternate work locations. The remaining factual findings are therefore organized Petitioner-by-Petitioner, beginning with the events relating to Dr. Fernandez.

III. Alternate Assignments & MDCPS' Disciplinary Dispositions

A. Dr. Fernandez

59. At the time of his reassignment to MDCPS' "Stores and Mail Distribution," Dr. Fernandez had served as NKCEC's principal—a position of immense responsibility—for more than 14 years, all the while earning favorable performance evaluations. Understandably, then, Dr. Fernandez was dispirited by the fact that, for the entirety of his involuntary transfer, which began on May 2, 2012, and continued until June 19, 2013, his new supervisor assigned him no more than an hour or two of duties each day. To make matters worse, Dr. Fernandez' responsibilities consisted exclusively of menial chores unbefitting a professional of his qualifications: sorting and packaging crayons; organizing car keys; packaging small mops; and sorting mail. For all that appears, Dr. Fernandez' weightiest assignment required him to perform an inventory, and even that took no more than a day or so.

60. As it happens, Dr. Fernandez' alternate assignment would have ended in June of 2012 were it not for Mr. Miranda's finding of probable cause. Suffice it to say that Dr. Fernandez did not take this turn of

events lying down—on July 12, 2012, he, along with Mr. Cristobol and Ms. Ramirez, filed a complaint with DOE alleging unlawful acts of reprisal by MDCPS.

61. Subsequently, on July 19, 2012, Ms. Ana Rasco, the administrative director of MDCPS' Office of Professional Standards, convened a conference for the record ("CFR") to discuss Ms. Chester's investigative report. During the course of the CFR, Dr. Fernandez denied the allegations against him and voiced his disagreement with the investigative findings. At the CFR's conclusion, Ms. Rasco directed Dr. Fernandez to remain at his alternate placement, refrain from contacting any parties involved in the investigation, and abide by all MDCPS policies. Ms. Rasco further informed Dr. Fernandez that disciplinary measures, including non-reappointment, could follow, and that "[a]ll investigative data [would] be transmitted to Professional Practices Services (PPS), Florida Department of Education [ ], for review and possible licensure action by the Education Practices Commission (EPC)."[46]

62. Concerned that his employment was in jeopardy, Dr. Fernandez submitted a letter to Ms. Rasco dated August 8, 2012, requesting that MDCPS withhold any imposition of discipline until DOE concluded its investigation of Petitioners' reprisal complaints. Although DOE did not officially terminate its reprisal

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[46] On December 13, 2013, DOE's commissioner found no probable cause to pursue disciplinary action against Dr. Fernandez' educator's certificate. Pet'r Ex. 16.

inquiry until April 12, 2013, it did furnish a copy of its final investigative report—whose content was largely unfavorable to MDCPS—to the parties in November of 2012.

63. Seemingly undeterred by DOE's report, MDCPS subsequently notified Dr. Fernandez that, by virtue of CIU's findings, his reappointment as an administrator (which MDCPS had provisionally granted some months earlier) would be rescinded effective March 8, 2013. Unwilling to give up without a fight, Dr. Fernandez requested an appeal conference, which was ultimately held on April 2, 2013.

64. As noted above, DOE formally terminated its reprisal investigation on April 12, 2013, at which time its commissioner notified MDCPS' superintendent of schools that, with respect to each Petitioner, "reasonable grounds exist to believe that an unlawful reprisal has occurred, is occurring, or is to be taken." The commissioner further informed MDCPS' superintendent that Petitioners' complaints would be forwarded to DOAH to conduct a formal hearing.

65. Following the issuance of the commissioner's notice, Dr. Fernandez' plight improved dramatically. First, MDCPS determined that neither a written reprimand nor any other formal discipline would be imposed. (Oddly, the same cannot be said for Mr. Cristobol, who received a written reprimand prior to the formal termination of DOE's investigation.) And, on June 19, 2013, MDCPS removed Dr. Fernandez from the alternate assignment and appointed him "ESE

Principal of Instruction Systemwide," a title he continues to hold.

66. During the final hearing, Dr. Fernandez expressed his desire to return to NKCEC as its principal, noting the relationships he had forged over the years with its students, faculty, and staff. Dr. Fernandez also lamented that, in contrast to his former principalship, which allowed him to serve as the site administrator for one school, his new position requires him to supervise multiple institutions. Nevertheless, the evidence demonstrates that Dr. Fernandez' current and former positions are comparable in terms of salary, benefits, and levels of responsibility.

67. This is not to say, however, that Dr. Fernandez suffered no loss of remuneration as a result of his ordeal. Specifically, the credible evidence demonstrates that, by virtue of his placement on alternate assignment, Dr. Fernandez was deprived of bonuses totaling at least $10,000 ($5,000 in 2011-2012, as well as an identical bonus the following school year).

B. Mr. Cristobol

68. The undersigned turns now to Mr. Cristobol, who was transferred to MDCPS' "Department of Transportation, Vehicle Maintenance" ("DOT") on May 2, 2012. At that time, Mr. Cristobol held a master's degree in educational leadership, had been employed with MDCPS for 15 years, and had served as NKCEC's assistant principal for six years.

69. Mr. Cristobol would soon discover, however, that his education and experience would be put to little use. Indeed, his first two or three days on alternate assignment were spent scanning a pile of documents. Once this backlog was cleared, Mr. Cristobol was asked, for the next two months, to scan new documents as they were received—a task he completed each morning in an hour or less. With no other assignments to perform, Mr. Cristobol spent the remainder of each workday (approximately seven hours) sitting in a small, sparsely furnished room. After several months of this routine, the DOT supervisor heeded Mr. Cristobol's pleas for additional work, permitting him to conduct inventories of auto parts.

70. The only silver lining for Mr. Cristobol was that, as a ten-month employee, the summer months afforded him a temporary reprieve from the drudgery of the alternate assignment. This would be short lived, however, for Mr. Miranda's finding of probable cause (on June 22, 2012) ensured that Mr. Cristobol would return to DOT at the start of the 2012-2013 school year. Mr. Cristobol's response to this turn of events was twofold: on July 12, 2012, he (and the other Petitioners) filed a complaint with DOE, which alleged that MDCPS had committed unlawful acts of reprisal; and, on August 7, 2012, he formally requested that MDCPS withhold any imposition of discipline until DOE completed its investigation.

71. As discussed previously, DOE forwarded a copy of its investigative report to Petitioners and MDCPS in November of 2012. Several months later, on

January 30, 2013, MDCPS transferred Mr. Cristobol from DOT to an alternate assignment at South Dade Senior High School ("South Dade") as a temporary assistant principal.

72. On February 21, 2013, prior to the formal conclusion of DOE's reprisal investigation, MDCPS closed its disciplinary proceeding against Mr. Cristobol with the issuance of a written reprimand, which provided, in relevant part:

> During the 2011-2012 school year, there were several instances where you neglected your duties as Assistant Principal at [NKCEC]. This infraction was found to have Probable Cause by [the] Civilian Investigative Unit. . . . These actions were in violation of School Board Policies 1210, Standards of Ethical Conduct; 1210.01, Code of Ethics; 7540.04, Staff Network and Internet Acceptable Use and Safety; and 7540.05, Staff Electronic Mail.
>
> * * *
>
> Please be advised that any recurrence of the above infraction may lead to further disciplinary action.[47]

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[47] As a result of this disciplinary action, Ms. Rasco filed an updated report, dated May 1, 2013, with DOE's Office of Professional Practices Services. (Ms. Rasco first reported Mr. Cristobol to DOE on or about July 17, 2012.) DOE's commissioner ultimately determined that there was no probable cause to pursue disciplinary action against Mr. Cristobol's professional license. Pet'r Ex. 24.

With the disciplinary action concluded, MDCPS promptly removed Mr. Cristobol from alternate assignment status and continued his placement at South Dade as an assistant principal.

73. In June of 2013, several months after DOE's commissioner informed the parties that reasonable grounds supported Petitioners' charges of reprisal, MDCPS transferred Mr. Cristobol to an assistant principalship at TERRA Environmental Research Institute ("TERRA")—one of MDCPS' premiere [sic] high school magnet programs, and an assignment comparable to his former position at NKCEC in terms of responsibility, salary, and benefits. In fact, Mr. Cristobol is now entitled to receive, by virtue of his placement at a high school, an annual supplement that boosts his total compensation by $4,000 annually.[48] Simply put, there

[48] Although Mr. Cristobol concedes that his present compensation (a salary of $80,000 and an annual supplement of $4,000) exceeds what he earned at NKCEC ($76,000), he nevertheless alleges an ongoing financial "loss" of $16,000 per year. Pet Supp'l Ex. 10. In particular, Mr. Cristobol argues that, because of TERRA's expansive activities schedule, he now works ten more hours each week than he did at NKCEC—hours he asserts are tantamount to unpaid overtime. This argument is without merit, however, for it is well established that administrative employees are not entitled to overtime compensation. *See* 29 U.S.C. § 213(a)(1); *Viola v. Comprehensive Health Mgmt.*, 441 Fed. Appx. 660, 662 (11th Cir. 2011) (explaining that the Fair Labor Standards Act "exempts any employee employed in a bona fide administrative capacity from the general rule that employees are entitled to overtime compensation for time worked over forty hours in a workweek."). In any event, it is clear that the additional work hours are not the product of ongoing reprisal by

has been no showing that Mr. Cristobol's involuntary transfer to DOT or his subsequent placement at TERRA resulted in any loss of remuneration.[49]

C. Ms. Ramirez

74. The undersigned turns finally to Ms. Ramirez, whose alternate assignment at MDCPS' "Federal and State Compliance Office" began on May 7, 2012. Although Ms. Ramirez would spend less time at her alternate placement (25 and one-half workdays) than the other Petitioners, her treatment was no less

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MDCPS but, rather, flow from the more stringent time demands of the new position.

[49] The undersigned has not overlooked the argument that Mr. Cristobol's reassignment to DOT deprived him of "Race to the Top" bonuses during the 2011-2012 and 2012-2013 school years. Although Mr. Cristobol undoubtedly missed out on these bonuses, he has failed to adduce any non-hearsay evidence concerning their value. Indeed, the record contains only one reference to the bonus amounts:

> Q. Had you been [at NKCEC], what funding would you have received because of these Race to the Top funds?
>
> A. I do not know.
>
> Q. So you come up with $1,000. How did you get that?
>
> A. Speaking with colleagues, that's a conservative amount. They're receiving [$]1,500 to $1,750.

Hr'g Tr. 1449:20-1450:1. This testimony, while unobjected to, is insufficient alone to establish the value of the bonuses. *See* § 120.57(1)(c), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions"); *Scott v. Dep't of Bus. & Prof'l Reg.*, 603 So. 2d 519, 520 (Fla. 1st DCA 1992).

humiliating. Indeed, Ms. Ramirez spent the entirety of her first week removing staples from seemingly endless piles of documents—items she was required to scan during the remainder of her assignment.

75. Not surprisingly, Ms. Ramirez was troubled by the menial nature of these new duties, which were plainly incompatible with her professional qualifications (a master's degree in early childhood special education) and years of experience. Indeed, Ms. Ramirez was so distraught that she would occasionally retreat from her work area to the restroom, where she would cry in solitude.

76. As a ten-month employee, Ms. Ramirez was not required to report to her alternate assignment during the summer of 2012.[50] However, on July 13, 2012, Mr. Miranda notified Ms. Ramirez that the CIU had found probable cause to believe that she had "utilized District time and resources to conduct non-school related business."[51] The supposed "non-school related

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[50] It is undisputed that Ms. Ramirez' placement on alternate assignment disqualified her from seeking employment with MDCPS during the summer of 2012. Pet'r Ex. 28. Although it is certain that Ms. Ramirez, if eligible, would have pursued summer employment, there is a paucity of evidence concerning the availability of such positions. The undersigned therefore declines to compensate Ms. Ramirez for the wages she might have earned during that period.

[51] By virtue of MDCPS' probable cause determination, Ms. Rasco reported Ms. Ramirez to DOE for possible disciplinary action against her educator's certificate. On December 18, 2013, DOE's commissioner closed the matter with a finding of no probable cause. Pet'r Ex. 31.

business," of course, was the charter school research Ms. Ramirez performed at the behest of her supervisor, Dr. Fernandez—who, as NKCEC's administrator, was obligated to create ballots, verify voter eligibility, and carry out the voting process.

77. Ms. Ramirez was afforded a conference for the record on August 2, 2012, during which she voiced her disagreement with MDCPS' untenable position that NKCEC administrators and staff were precluded from utilizing *any* school time or resources in connection with the prospective conversion. Nevertheless, the district director in attendance, Ms. Anne-Marie DuBoulay, formally directed Ms. Ramirez to adhere to all MDCPS policies, to abide by the terms of her alternate placement, and to "cease and desist from using District resources inappropriately." Ms. Ramirez was further admonished that non-compliance with these directives would "necessitate review by the Office of Professional Standards for the imposition of disciplinary measures."

78. Thereafter, on the first workday of the 2012-2013 school year, MDCPS removed Ms. Ramirez from her alternate placement, relocated her to one of its regional offices, and restored her to a placement specialist position. By all accounts, this new assignment, which Ms. Ramirez continues to hold (and wishes to retain[52]), involves responsibilities and duties

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[52] On this point, Ms. Ramirez' testimony was as follows:

ADMINISTRATIVE LAW JUDGE: Just in terms of the relief that you're requesting here, you don't – If I

comparable to those of her former position. It appears, moreover, that Ms. Ramirez' total compensation is equal to or greater than what she received during her final year at NKCEC.[53]

79. Some months later, on January 8, 2013 (subsequent to DOE's issuance of its investigative report), MDCPS disposed of its disciplinary action against Ms. Ramirez by re-issuing the directives imposed during the August 2012 conference for the record.

CONCLUSIONS OF LAW

I. Jurisdiction and Burden of Proof

80. DOAH has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569, 120.57(1), and 1002.33(4)(a)6., Florida Statutes.

81. As the parties asserting the affirmative of the issue, Petitioners bear the burden of proof in this

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> were to find a violation of the statute . . . and we're trying to formulate what to do for you, you are not asking me to move you from where you are; is that correct?
>
> THE WITNESS: That is correct. I want my record cleared.

Hr'g Tr. 665:5-12.

[53] While it appears that Ms. Ramirez no longer receives one stipend in particular (furnished to educators assigned to institutions, such as NKCEC, which serve severely disabled children), her testimony fails to establish any *overall* loss of compensation. Indeed, Ms. Ramirez conceded during her cross-examination that she recently received a salary increase, and that she "doesn't know" how her total pay is calculated. Hr'g Tr. 662:11-22.

proceeding. *See Dep't of Transp. v. J.W.C. Co*., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

II. Unlawful Reprisal

82. As discussed previously, the Legislature has made clear that charter schools shall be part of Florida's program of public education. § 1002.33(1), Fla. Stat. In furtherance of this objective, section 1002.33(4)(a) provides as follows:

> No district school board, or district school board employee who has control over personnel actions, shall take unlawful reprisal against another district school board employee because that employee is either directly or indirectly involved with an application to establish a charter school. As used in this subsection, the term "unlawful reprisal" means an action taken by a district school board or a school system employee against an employee who is directly or indirectly involved in a lawful application to establish a charter school, which occurs as a direct result of that involvement, and which results in one or more of the following: disciplinary or corrective action; adverse transfer or reassignment, whether temporary or permanent; suspension, demotion, or dismissal; an unfavorable performance evaluation; a reduction in pay, benefits, or rewards; elimination of the employee's position absent of a reduction in workforce as a result of lack of moneys or work; or other adverse significant changes in duties or responsibilities that are

> inconsistent with the employee's salary or employment classification.

83. Aptly recognizing the parallels between section 1002.33(4)(a) and the Florida Civil Rights Act ("FCRA," a statutory provision modeled after Title VII), the parties agree that the burden-shifting framework particular to retaliation claims should be used to evaluate Petitioners' complaints. Pursuant to that framework, a prima facie case is established upon proof: (1) that the employee engaged in a statutorily protected activity; (2) that he or she suffered an adverse employment action; and (3) that the adverse action was causally related to the protected activity. *Blizzard v. Appliance Direct, Inc.*, 16 So. 3d 922, 926 (Fla. 5th DCA 2009). Where the employee makes a prima facie showing, the burden of production shifts and the employer must articulate a legitimate, nondiscriminatory reason for the adverse action. *Id.* If the employer is able to do so, the burden shifts back to the employee to demonstrate that the proffered reason is pretext for retaliation and that, more generally, the employee's "protected activity was a but-for cause of the alleged adverse action by the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013).

84. In an effort to score an early knockout, MDCPS contends that, because an application to convert NKCEC was never filed, Petitioners cannot demonstrate that they engaged in a protected activity—in this context, the direct or indirect involvement "with an application" to establish a charter school:

> Accordingly, because no application was filed, and thus there exists no protected activity, Petitioners cannot assert that they suffered unlawful reprisal for having engaged in a protected activity.

Resp't PRO at 24.

85. This argument is untenable for several reasons. First, MDCPS' interpretation would require the undersigned to read language into the statute that simply isn't there. For activity to be protected, section 1002.33(4)(a) requires only direct or indirect involvement "with an application"; the statute does *not* read "with a *filed* application" or "with a *submitted* application." Moreover, if the prohibition against unlawful reprisal were triggered only upon the filing of the application, a district hostile to charter schools could freely engage in scorched-earth tactics aimed at dooming an impending conversion vote or, worse yet, bullying its employees into abandoning the effort altogether.

86. Refusing to yield to the force of this reasoning, MDCPS asseverates that, if its interpretation of section 1002.33(4)(a) is rejected, "even the mere mention of the idea of conversion in a favorable light would be sufficient to trigger the protections of the statute." Resp't PRO at 23. After stuffing this straw man, MDCPS proceeds to shred it, contending that such an expansive reading would render the statute meaningless. This argument, of course, fails to acknowledge that Petitioners did considerably more than "mention" the idea of conversion. Indeed, as detailed previously,

the formal ballot process had been initiated (prompted by Petitioners' efforts), meetings with parents and faculty were held, and, as required by rule 6A-6.0787, a vote was scheduled.

87. It is concluded that where, as here, the ballot process was formally and lawfully set in motion, an "application" to convert the school existed whether it was ultimately filed or not. Significantly, this interpretation is consonant with the language of rule 6A-6.0787, which contemplates the existence of an application even absent a submission:

> (2) Ballot process.
>
> (a) Support for a conversion charter school shall be determined by secret ballot.
>
> (b) Teachers and parents shall be offered the opportunity to vote on whether or not to approve the charter school proposal.
>
> * * *
>
> (3) Ballot results.
>
> * * *
>
> (d) If a majority of teachers employed at the school and a majority of voting parents support the charter proposal, the conversion charter application must be submitted by the application deadline that follows the ballot. The ballot results may not carry over to another school year or application period.

> (e) If a majority of parents and/or teachers *do not support* the charter proposal, *the application may not be submitted* to the sponsor.

(emphasis added).

88. Having satisfied the first element of a prima facie case, Petitioners must next demonstrate that they suffered an adverse employment action. As section 1002.33(4)(a) instructs, such actions include, among other things: an adverse transfer or reassignment, whether temporary or permanent; disciplinary or corrective action; or other "adverse significant changes in duties or responsibilities that are inconsistent with the employee's salary or employment classification."

89. In light of the limited remedial authority granted by section 1002.33(4)(a), it is unnecessary to address each of the myriad adverse actions Petitioners have identified. It suffices instead to conclude that Petitioners' transfers from NKCEC to their respective alternate assignments, where they were required to perform menial tasks wholly incompatible with their positions, resulted in adverse significant changes in duties or responsibilities.

90. As for the element of causation, Petitioners have adduced substantial evidence that the adverse transfers would not have occurred but for their involvement with the prospective conversion. As detailed previously, the initiation of the ballot process was immediately met with Mr. Gordillo's ominous remark to Dr. Fernandez that "repercussions" would ensue. This

warning was accompanied by MDCPS' assignment of Ms. Goldman and Mr. Gordillo to NKCEC's campus, an action plainly intended to unsettle the faculty and derail the conversion effort. MDCPS continued its blitzkrieg with the dissemination of incomplete (and sometimes misleading) information to NKCEC's parents and faculty concerning the ramifications of a conversion. This was followed by MDCPS' improper usurpation of Dr. Fernandez' authority over the ballot process—power it wielded by issuing a last-minute directive to hold the vote as originally scheduled, notwithstanding its earlier, unequivocal representation to Dr. Fernandez that the vote could be delayed. Although Dr. Fernandez aborted the ballot process shortly thereafter, Ms. Goldman remained on NKCEC's campus for the next four weeks (a fact belying MDCPS' claim that she was assigned to NKCEC to "answer questions"), at which point Petitioners were transferred, in clear violation of MDCPS policy, to alternate work assignments. *See Giacoletto v. Amax Zinc Co.*, 954 F.2d 424, 427 (7th Cir. 1992) (holding that the employer's deviation from its established procedure furnished circumstantial evidence of unlawful retaliation).

91. The foregoing evidence, formidable in itself, is buttressed by the conspicuous unfairness of the CIU investigations, which MDCPS conducted in a way that guaranteed adverse outcomes for each Petitioner. This was accomplished by MDCPS' adherence to the unreasonable notion that Petitioners were ethically prohibited from using *any* worksite time or resources in connection with the conversion, and by its deliberate

conflation of "coercion" (what was actually alleged) and "persuasion" (what was actually investigated). As further evidence of improper animus, MDCPS capped off its investigations with a variety of spurious findings—for instance, that students were improperly receiving progress reports instead of grades, that an "unauthorized" visitor was permitted on campus, and that NKCEC should have been using MDCPS' electronic gradebook system—designed to paint Dr. Fernandez and Mr. Cristobol as negligent administrators.

92. Concluding that each Petitioner has established a prima facie case of unlawful reprisal, the burden shifts to MDCPS to proffer a nonretaliatory explanation for the adverse transfers. This burden is one of production, not persuasion—that is, MDCPS need only introduce "evidence which, *taken as true*, would *permit* the conclusion that there was a [nonretaliatory] reason for the adverse action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993) (emphasis in original); *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1205 n.14 (11th Cir. 2013) ("[T]he employer's burden is not one of persuasion but a burden of production, which itself can involve no credibility assessment") (internal quotation marks omitted). In its Proposed Recommended Order, MDCPS posits, consistent with Ms. Chester's testimony, that Dr. Fernandez and Mr. Cristobol were transferred "to ensure that witnesses would cooperate in the investigation," and that Ms. Ramirez was relocated because the "CIU investigator feared that [her] presence at [NKCEC] could adversely impact the investigation by relaying information to

Petitioners Fernandez and Cristobol." Resp't PRO at 14; 18. Taking these explanations as true for the moment, as the foregoing authority requires, MDCPS has sustained its burden of production.

93. With MDCPS' burden of production satisfied, the undersigned turns to the ultimate question: whether Petitioners have demonstrated by a preponderance of the evidence that, but for their involvement with the prospective conversion, the transfers to the alternate assignments would not have occurred. At this stage of the burden-shifting process, it is no longer necessary to accept MDCPS' proffered explanations as true; this is significant, as it is well settled that "a plaintiff's prima facie case, combined with disbelief of the defendant's proffered reasons for the negative employment action, permits a finding of retaliation by the factfinder." *Imwalle v. Reliance Med. Prods.*, 515 F.3d 531, 545 (6th Cir. 2008); *King v. Preferred Tech. Group*, 166 F.3d 887, 894 (7th Cir. 1999); *see also Palmer v. Bd. of Regents of the Univ. Sys. of Ga.*, 208 F.3d 969, 974 (11th Cir. 2000) (explaining that the fact finder's "disbelief of the defendant's explanation is enough because the untruthfulness itself can provide the necessary inference of discrimination."). This is such a case, for as detailed earlier in the Findings of Fact, the undersigned has expressly discredited the testimony of MDCPS' witnesses concerning its reasons for the transfers. The disbelief of MDCPS' proffered explanations, in combination with the evidence adduced as part of Petitioners' prima facie cases, is sufficient to

support the ultimate finding that MDCPS violated section 1002.33(4)(a).[54]

III. Remedies

94. Turning finally to the question of remedies, section 1002.33(4)(b) provides, in relevant part:

> (b) In any action brought under this section for which it is determined reasonable grounds exist to believe that an unlawful reprisal has occurred, is occurring, or is to be taken, the relief shall include the following:
>
> 1. Reinstatement of the employee to the same position held before the unlawful reprisal was commenced, *or to an equivalent position,* or payment of reasonable front pay as alternative relief.
>
> 2. Reinstatement of the employee's full fringe benefits and seniority rights, as appropriate.

---

[54] In reaching this result, the undersigned has given no weight to DOE's ultimate investigative conclusions, which were conclusory and unsupported by any analysis. *See generally Coleman v. Quaker Oats Co.,* 232 F.3d 1271, 1281 (9th Cir. 2000) ("[T]he EEOC probable cause determinations in these cases carry little weight since they are conclusory and completely devoid of analysis."). However, as explained in *supra* note 28, the witness statements documented in DOE's fact-finding report have been used to evaluate the consistency of MDCPS' explanations regarding Petitioner's transfers.

> 3. Compensation, if appropriate, for *lost wages, benefits, or other lost remuneration* caused by the unlawful reprisal.
>
> 4. Payment of *reasonable costs, including attorney's fees, to a substantially prevailing employee,* or to the prevailing employer if the employee filed a frivolous action in bad faith. . . .

(emphasis added).

95. As reflected by the forgoing language, each Petitioner is entitled, as a substantially prevailing party, to an award of attorney's fees. In addition, MDCPS must compensate Dr. Fernandez for $590 in costs he incurred during the course of the instant litigation.

96. With respect to compensation for "lost wages, benefits, or other lost remuneration caused by the unlawful reprisal," Dr. Fernandez has demonstrated that his placement on alternate assignment deprived him of bonuses totaling $10,000. It is concluded, however, that Petitioners' remaining requests for compensation either fail as a matter of proof or fall outside the ambit of section 1002.33(4)(b)3.

97. Finally, it is necessary to address Dr. Fernandez and Mr. Cristobol's requests for reinstatement to their former positions. In resolving this issue, it is critical to note, first, that each Petitioner presently occupies an assignment that is equivalent, both in terms of compensation and responsibility, to his previous position at NKCEC. This is significant, for section

1002.33(4)(b)1. does not mandate the restoration of the employee to his or her former assignment; rather, it contemplates reinstatement either to the same position "*or* to an equivalent position." (Emphasis added). Finally, it is important to acknowledge that, during the two-year period since Dr. Fernandez and Mr. Cristobol's removal from NKCEC, MDCPS assigned two new administrators (neither of whom had any involvement with the reprisal) to fill the vacancies created by the involuntary transfers.

98. Although mindful of Dr. Fernandez and Mr. Cristobol's deep commitment to NKCEC's students and faculty, as well as the substantial grief and heartbreak that accompanied their adverse transfers, the undersigned declines to recommend Petitioners' reinstatement to their former positions—relief that would necessitate the displacement of NKCEC's entire administrative staff and result in further disruption to the institution.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Department of Education enter a final order: finding that the Miami-Dade County School Board violated section 1002.33(4)(a) with respect to each Petitioner; awarding attorney's fees to each Petitioner; and ordering that the Miami-Dade County School Board compensate

Petitioner Dr. Alberto T. Fernandez in the amount of $10,590.00.

DONE AND ENTERED this 30th day of June, 2014, in Tallahassee, Leon County, Florida.

/s/ Edward T. Bauer
EDWARD T. BAUER
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 30th day of June, 2014.

COPIES FURNISHED:

Luis M. Garcia, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

Robin Gibson, Esquire
Amy U. Tully, Esquire
Gibson Law Firm
299 East Stuart Avenue
Lake Wales, Florida 33853

Judy Bone, Esquire
Department of Education
325 West Gaines Street, Room 1244
Tallahassee, Florida 32399-0400

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

Pam Stewart, Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Alberto M. Carvalho, Superintendent
Miami-Dade County School Board
1450 Northeast Second Avenue
Miami, Florida 33132-1308

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.

STATE OF FLORIDA
DEPARTMENT OF EDUCATION

DR. ALBERTO T. FERNANDEZ,
HENNY CRISTOBOL, AND
PATRICIA E. RAMIREZ,

Petitioners,

vs.

MIAMI-DADE COUNTY
SCHOOL BOARD,

Respondent.
/

CASE No.
DOE 2014-3055
DOAH Case No.
13-1492

FINAL ORDER

(Filed Nov. 10, 2014)

Upon review of the record, the Florida Department of Education hereby enters this Final Order pursuant to sections 120.569 and 120.57(1), F.S.

PRELIMINARY STATEMENT

This cause arises from the Petitioners' complaints, who are employees of the Miami-Dade County School Board, claiming that the School Board committed acts of reprisal against them because of their involvement in an attempt to convert Neva King Cooper Educational Center (Neva King) to a public charter school. Such reprisals were allegedly in violation of section 1002.33(4)(a), F.S. That provision of the law prohibits unlawful reprisal and provides in relevant part:

> *[n]o district school board, or district school board employee who has control over personnel actions, shall take unlawful reprisal against another district school board employee because that employee is either directly or indirectly involved with an application to establish a charter school.*

The complaints were heard by the Division of Administrative Hearings. The hearing was held on January 27 through 31, and on February 14, 2014.

In his June 30, 2014, Recommended Order (RO), the Administrative Law Judge (ALJ)

> *RECOMMENDED that the Florida Department of Education enter a final order: finding that the Miami-Dade County School Board violated section 1002.33(4)(a) with respect to each Petitioner; awarding attorney's fees to each Petitioner; and ordering that the Miami-Dade County School Board compensate Petitioner Dr. Alberto T. Fernandez in the amount of $10,590.00.*

A copy of the RO is attached as Exhibit A.

Both the Petitioners and the Respondents filed exceptions to the RO, as well as responses to the exceptions, pursuant to section 120.57(1)(k), F.S., and Fla. Admin. Code R. 28-106.217.

STANDARD OF REVIEW

Standard of Review of Findings of Fact

The agency may not reject or modify a factual finding unless the agency reviews the entire record and states with particularity in the order that the finding was not based on competent substantial evidence or that the proceeding did not comply with the essential requirements of law. *See*, section 120.57(1), F.S. Factual inferences are to be drawn by the [ALJ] as trier of fact. *Prysi v. Department of Health*, 823 So.2d 823 (Fla. 1st DCA 2002); *Heifetz v. Dep't of Bus. Reg. Division of Alcoholic Beverages & Tobacco*, 475 So.2d 1277, 1283 (Fla. 1st DCA 1985). An agency is not authorized to weigh evidence or judge credibility. *Id.* at 1281; *Greseth v. Department of Health & Rehab. Serv.*, 573 So.2d 1004 (Fla. 4th DCA 1991). An ALJ's findings cannot be rejected unless there is no competent substantial evidence from which the findings could reasonably be inferred. *Prysi*, 823 at 825; *Heifetz*, 475 So.2d at 1281.

Standard of Review of Conclusions of Law

Unlike factual conclusions, an agency's review of conclusions of law and interpretations of administrative rules found within an RO is de novo where the statutes or rules fall within the substantive jurisdiction of the agency. *See*, *Hoffman v. State, Dep't of Management Service*, 964 So.2d 163 (Fla. 1st DCA 2007). Thus, pursuant to section 120.57(1), F.S., an agency may reject or modify an ALJ's conclusion of law and the interpretation of administrative rules over which

the agency has substantive jurisdiction. In doing so, an agency must state with particularity its reasons for rejecting or modifying the conclusion of law or interpretation of rule and must find that its substituted conclusion of law is as reasonable, or more reasonable, than the one it rejects or modifies. Considerable deference should be accorded to agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless clearly erroneous. *See, e.g.*, *Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985).

RULINGS ON EXCEPTIONS

Parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of ALJs by filing exceptions to recommended orders. *See, Comm'n on Ethics v. Barker*, 677 So.2d 254, 256 (Fla. 1996). Having filed no exceptions to certain findings of fact, the party has thereby expressed its agreement with, or at least waived any objections to, those findings of fact. *See, Envtl. Coalition of Fla. v Broward County*, 586 So.2d 1212, 1213, (Fla. 1st DCA 1991). In reviewing a recommended order, the agency's final order "shall include an explicit ruling on each exception." *See*, section 120.57(1)(k), F.S.

EXCEPTIONS SUBMITTED BY THE SCHOOL BOARD

The School Board did not file an exception to the finding that the Board had unlawfully retaliated against the Petitioners for pursuing a conversion charter for Neva King. The School Board has, however, submitted one exception, namely that the record lacks any competent substantial evidence to support the award of a $10,000 bonus to Dr. Fernandez.

The RO states as follows:

> *. . . the credible evidence demonstrates that, by virtue of his placement on alternate assignment, Dr. Fernandez was deprived of bonuses totaling at least $10,000 ($5,000 in 2011-2012, as well as an identical bonus the following school year).*

RO at p. 40, Paragraph 67.

> [*w*]*ith respect to compensation for "lost wages, benefits, or other lost remuneration caused by the unlawful reprisal," Dr. Fernandez has demonstrated that his placement on alternate assignment deprived him of bonuses totaling $10,000. It is concluded however, that Petitioners' remaining requests for compensation either fail as a matter of proof or fall outside the ambit of section 1002.33(4)(b)3.*

RO p. 55, Paragraph 96.

The record reveals that previous to the unlawful reprisal Dr. Fernandez' performance was assessed as either distinguished or exemplary, the two highest

ratings awarded by the school district. (T. 348, 388) Further, in the past and while serving as principal of Neva King, Dr. Fernandez received the highest bonus given to any principal in the district. (T. 1414.) Bonuses were given by the school district during the 2011-12 and 2012-13 school years under the Race to the Top grant. These bonuses ranged from $3,000 to $25,000 annually. (T. 1414-1416) Bonuses were provided based upon student achievement using the FCAT or the assessment given to students with disabilities, specifically the Florida Alternate Assessment (FAA). The students at Neva King took the Alternate Assessment. Based upon this evidence, and the reasonable inferences to be drawn from this evidence, there is competent substantial evidence for the ALJ to determine that Dr. Fernandez was deprived of two bonuses of at least $5,000 each year. While there was testimony that bonuses were dependent upon school grades, there was also testimony that the bonuses were dependent upon student performance and that performance of students at Neva King was measured by the FAA. Conflicting testimony has been resolved by the ALJ. Therefore, after review of the entire record, this exception is denied.

EXCEPTIONS SUBMITTED BY THE PETITIONERS

The Petitioners have filed exceptions to the remedies recommended by the ALJ.

Exception 1: Reinstatement

First, Dr. Fernandez and Mr. Cristobol argue that their current positions with the School Board are not equivalent to their prior positions and seek an order compelling the School Board to hire them at Neva King in their former positions, respectively as the principal and assistant principal.

The relevant paragraphs of the RO provide as follows:

> *Finally, it is necessary to address Dr. Fernandez and Mr. Cristobol's requests for reinstatement to their former positions. In resolving this issue, it is critical to note, first, that each Petitioner presently occupies an assignment that is equivalent; both in terms of compensation and responsibility, to his previous position at NKCED* [sic]. *This is significant, for section 1002.33(4)(b)1. Does not mandate the restoration of the employee to his or her former assignment; rather, it contemplates reinstatement either to the same position "or to an equivalent position." (Emphasis added). Finally, it is important to acknowledge that, during the two-year period since Dr. Fernandez and Mr. Cristobol's removal from NKCEC, MDCPS assigned two new administrators (neither of whom had any involvement with the reprisal) to fill the vacancies created by the involuntary transfers.*
>
> *Although mindful of Dr. Fernandez and Mr. Cristobol's deep commitment to NKCEC's students and faculty, as well as the substantial grief and heartbreak that accompanied their*

> *adverse transfers, the undersigned declines to recommend Petitioners' reinstatement to their former positions – relief that would necessitate the displacement of NKCEC's entire administrative staff and result in further disruption to the institution.*

RO, Paragraphs 97-98.

The question of whether a position is an equivalent one is a question of fact. Factors to be considered in determining whether a position is equivalent include compensation, title, job responsibilities, working conditions and status. *See, Weaver v. Casa Gallaido*, 922 F.2d 1515, 1527 (11th Cir. 1991). The record reveals that Mr. Cristobol has the same title, job responsibilities and better compensation. (T. 1454, 1455). While Mr. Cristobal [sic] is Assistant Principal of a magnet school and not one serving students with disabilities, the statute does not require placement in an identical position. *See*, section 1002.33(4)(b)1., F.S. Similarly, Dr. Fernandez is serving as a principal and holds the position of Exceptional Student Education Principal system-wide. Indeed, he serves the same type of student, that is, students with disabilities, and he receives the same compensation (T. 331-333). The factual conclusion that Dr. Fernandez and Mr. Cristobol hold an equivalent position is supported by competent substantial evidence and thus, the exception is denied.

The Petitioners' argument that the statute prioritizes the remedy of reinstatement to the former position is a question of law and is rejected. The relief under the statute for unlawful reprisal includes three

alternatives, including reinstatement to the same position, appointment to an equivalent position and payment of reasonable front pay. *See*, section 1002.33(4)(b)1., F.S. When deciding which of these remedies to provide, the district's constitutional authority to operate, control, and supervise public schools within the district must be considered. Further, even in the absence of state constitutional considerations, reinstatement is not required where there are countervailing concerns. *See, Bruso v. United Airlines*, 239 F.3d 848 (7th Cir. 2001). For the foregoing reasons, Exception 1 is denied.

Exception 2: Economic Losses by Mr. Cristobol and Ms. Ramirez

Next, Mr. Cristobol and Ms. Ramirez have filed exceptions regarding economic losses. The relevant portion of the RO provides as follows:

> [*w*]*ith respect to compensation for "lost wages, benefits, or other lost remuneration caused by the unlawful reprisal, Dr. Fernandez has demonstrated that his placement on alternate assignment deprived him of bonuses totaling $10,000. It is concluded, however, that Petitioners' remaining requests for compensation either fail as a matter of proof or fall outside the ambit of section 1002.33(4)(b)3.*

RO, paragraph 96.

The relevant portion of the statute provides that the remedy for unlawful reprisal includes "[c]ompensation, if appropriate, for lost wages, benefits, or other

lost remuneration caused by the unlawful reprisal." Section 1002.33(4)(b)3, F.S. The question of whether a cost falls within the parameters of the statute is one of law. There is no definition of remuneration in the reprisal statute, but in other places in the educational code, remuneration is defined as salary, bonuses, and cash-equivalent compensation paid to [an employee] . . . by his or her employer for work performed. *See, e.g.*, sections 1001.50(5); 1012.885(1)(c); 1012.975(1)(c); 1012.976(1)(c), F.S. When a term is not defined within a statute, a fundamental tool of construction requires giving a statutory term its plain and ordinary meaning. *Green v. State*, 604 So.2d 471 (Fla. 1992). When necessary, the plain and ordinary meaning can be ascertained by reference to a dictionary. *Id.* at 473. Remuneration is defined as payment for a service in the Webster's Dictionary, and as a reward, recompense, salary or compensation in Black's Dictionary. Under the definitions found in the educational code and the ordinary meaning of the word, the expenses Ms. Ramirez seeks for additional travel time and child care, are not lost compensation under the statute. For the same reason, payment for an additional hour while reassigned also fails.

With regard to compensation for the lost opportunity for summer employment, the RO provides that "there is a paucity of evidence concerning the availability of such positions." (RO page 63, n. 50.) An agency is not authorized to reweigh the evidence and thus, the exception, is denied.

The exception claiming that Mr. Cristobol should have been awarded $1,000 for the two school years of 2010-11 and 2011-12, as a Race to the Top bonus is also denied. Contrary to Petitioners' argument, evidence about the bonus value for a principal does not constitute competent substantial evidence about the value of a bonus for an assistant principal. As the ALJ correctly noted, the Petitioner has failed to provide any non-hearsay evidence on the value of any putative bonus. (RO, p. 63, n. 49.) Exception 2 is denied.

Exception 3: Removal of Derogatory materials from personnel files

Petitioners "seek to have their personnel files cleared of derogatory matter that was used to justify what has now been discredited as an unlawful reprisal . . . " (Petitioners Exceptions to Recommended Order, p. 13.) Petitioner relies upon section 1012.31, F.S., as authority for the removal contending that since exploration of a conversion charter cannot serve as a basis for discipline, all derogatory material relating to the Petitioners' efforts in this regard must be removed from their files. Assuming that this relief was properly requested, it falls outside of the relief authorized as a remedy for unlawful reprisal under section 1002.33(4)(a) and is contrary to the public records law. *See*, AGO 2011-19 (assessment of assistant superintendent that was not completed in accordance with the law is a public record and may not be removed from public view or destroyed); *See also*, AGO 94-54 (in the absence of express statutory authority, an agency is not authorized

to maintain its personnel records of its employees under two files, one open and one confidential). As a result, this exception is denied.

Exception 4: Remand to DOAH for a recommendation as to the amount of reasonable costs, including attorney's fees

The RO recommends the award of attorney's fees to each Petitioner. (RO, page 57). The RO, however, does not contain a recommendation as to the amount of the costs and fees. The petitioners have filed an exception, requesting that the matter of fees and costs be remanded to DOAH for an evidentiary hearing. The school district's response does not address this exception. The award of fees and costs is obviously authorized under the statute. *See*, section 1002.33(4)(b)4., F.S. Further, it appears that the request is more properly viewed as a motion to remand, rather than an exception to the RO. As such, the exception is construed as a motion to remand, and the motion is granted solely for the purpose of conducting a fact finding determination, to be followed by a recommendation, as to the amount of reasonable costs and attorney's fees to be awarded the plaintiffs.

FINDINGS OF FACT

The Administrative Law Judge's Findings of Fact, paragraphs 1-79, of the Recommended Order, are hereby adopted as the Findings of Fact of this Final Order.

CONCLUSIONS OF LAW

The Administrative Law Judge's Conclusions of Law, paragraphs 80-98, are hereby adopted as the Conclusions of Law of this Final Order.

DISPOSITION

Upon review of the entire record, the foregoing Findings of Fact, Conclusions of Law, and Rulings on the Exceptions filed by the Parties, it is

ORDERED and ADJUDGED that

(1) Miami-Dade County School Board violated section 1002.33(4)(a), F.S. with respect to the three Petitioners, Dr. Alberto T. Fernandez, Mr. Henny Cristobol and Ms. Patricia E. Ramirez.

(2) The Respondent Miami-Dade County School Board shall compensate Petitioner Dr. Alberto T. Fernandez in the amount of $10,590.00.

(3) The Petitioners are awarded reasonable costs, including attorney's fees; and

(4) The matter is remanded to the ALJ solely for the purpose of a fact finding determination, supported by contemporaneous time records and evidence as to the appropriate hourly rate, to be followed by a recommendation as to the amount of reasonable costs, including attorney's fees, to the Petitioners.

DONE AND ORDERED this 6th day of November 2014, in Tallahassee, Leon County, Florida.

/s/ Pam Stewart
Pam Stewart
Commissioner of Education
State of Florida

COPIES FURNISHED TO:

Luis M. Garcia, Esq.
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

Robin Gibson, Esq.
Amy W. Tully, Esq.
Gibson Law Firm
299 East Stewart Avenue
Lake Wales, Florida 33853

Lois Tepper
Interim General Counsel
Department of Education
325 W. Gaines Street, Suite 1244
Tallahassee, Florida 32399

Edward T. Bauer
Administrative Law Judge
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Clerk, Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Alberto M. Carvalho, Superintendent
Miami-Dade County School Board
1450 Northeast Second Avenue
Miami, Florida 33132-1308

NOTICE OF APPEAL RIGHTS

This order is final agency action. Judicial review of final agency action may be had by filing notices of appeal in both the appellate district where the petitioner resides and with the clerk of the Department within 30 calendar days of the date this order is filed in the official records of the Department. § 120.68, F.S.; Fla. R. App. P. 9.110. UNLESS A NOTICE OF APPEAL IS TIMELY FILED, NO FURTHER REVIEW IS PERMITTED.

CERTIFICATE OF SERVICE
BY THE AGENCY CLERK

I **HEREBY CERTIFY**, that a true and correct copy of the foregoing Final Order has been furnished by United States mail to:

this 6th day of November, 2014.

/s/ [Illegible]
Agency Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14319-HH

ALBERTO FERNANDEZ,
HENNY CRISTOBOL,

Plaintiffs - Appellants,

PATRICIA RAMIREZ,

Plaintiff,

versus

THE SCHOOL BOARD OF
MIAMI-DADE COUNTY, FLORIDA,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Oct. 24, 2018)

BEFORE: MARCUS and WILSON, Circuit Judges, and HOWARD,* District Judge. PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/s/ Stanley Marcus
UNITED STATES
CIRCUIT JUDGE

* Honorable Marcia Morales Howard, United States District Judge for the Middle District of Florida, sitting by designation.

Florida Administrative Code
Effective date: 6/22/2010

6A-6.0787 Ballot Process for Teacher and Parent Voting for Charter School Conversion Status.

An application be proposing to covert [sic] an existing public school to a charter school must demonstrate the support of teachers and parents in accordance with section 1002.33(3)(b), F.S. The following provisions are established to detail the ballot process by which such support shall be demonstrated.

(1) Initiation of ballot process. A district school board, the principal, teachers, parents, and/or the school advisory council at an existing public school that has been in operation for at least two (2) years may submit a request in writing to the school administrator to conduct a vote for conversion. The request shall be submitted no later than ninety (90) days prior to the August 1 deadline for charter applications. The administrator shall initiate the ballot process within sixty (60) days of receipt of the written request and the ballot process shall be completed no less than thirty (30) days prior to the charter application deadline.

(2) Ballot process.

(a) Support for a conversion charter school shall be determined by secret ballot.

(b) Teachers and parents shall be offered the opportunity to vote on whether or not to approve the charter school proposal.

(c) A minimum of one school day shall be allotted for teachers to submit a ballot and a minimum of

six (6) consecutive school days shall be allotted for parents to submit a ballot.

(d) Written notification of a ballot shall be provided to teachers and parents at least thirty (30) days prior to conducting the ballot. The notification shall include, at a minimum:

1. The definition of a charter school;

2. A description of the conversion process;

3. The dates and conditions under which a ballot may be submitted;

4. The date and location of a scheduled public meeting where the ballots will be counted; and,

5. Contact information for additional questions.

(e) The official ballots shall be created and distributed by the school and submitted by teachers and parents in a sealed, unmarked envelope also provided by the school.

(f) Separate ballot boxes shall be created for teacher and parent votes and each box shall be visibly sealed, supervised during school hours, and secured when the school is closed in order to maintain the confidentiality of ballots.

(g) Upon placement of the ballot by the voter into the ballot box, the school administrator or designee who is not eligible to vote shall confirm the individual's eligibility to vote and document who submitted the

ballot in order to ensure only eligible individuals vote and no individual votes more than once.

(3) Ballot results.

(a) As soon as possible, but not more than three (3) school days after closing the ballot, a public meeting shall be held in which an independent arbitrator, selected by the agreement between the school administrator and the applicant, will unseal the teacher and parent ballot boxes and count the ballots aloud in the presence of meeting attendees.

(b) Each vote shall be tallied by the independent arbitrator.

(c) The final ballot results shall be posted in a prominent location on the school site.

(d) If a majority of teachers employed at the school and a majority of voting parents support the charter proposal, the conversion charter application must be submitted by the application deadline that follows the ballot. The ballot results may not carry over to another school year or application period.

(e) If a majority of parents and/or teachers do not support the charter proposal, the application may not be submitted to the sponsor.

(f) Only one (1) vote per school year may be held.

(4) Teacher voting. For purposes of this rule a teacher is an individual as defined in section 1012.01(2)(a), F.S., and employed by the school for more than half of

each school day. School administrators are not eligible to vote.

(a) Teacher ballots shall be uniform in design and created and distributed by the school along with a sealable, unmarked envelope.

(b) A teacher who is absent, on leave, or otherwise unavailable to submit his or her ballot during the designated balloting window may:

1. Designate another individual to submit his or her ballot. The teacher must put the sealed ballot in another envelope and sign the seal of the outside envelope. When the designee presents the ballot at the school's site, it shall be removed from the signed outer envelope and immediately placed in the ballot box.

2. Submit the ballot early upon mutual agreement between the teacher and the school administrator.

(c) A teacher may refuse to vote or choose not to submit a ballot, which is equivalent to voting not to approve the charter proposal.

(5) Parent voting. For purposes of this rule, each household shall receive one ballot regardless of the number of students residing in the household. If a student has two households, the household of the enrolling parent shall receive the ballot.

(a) Parent ballots shall be uniform in design and created and distributed by the school along with a sealable, unmarked envelope.

1. The ballot and envelope shall be mailed to the household of each student enrolled in the school before the ballot is conducted.

2. Extra ballots shall be made available at the school's location during the balloting window.

3. A ballot may be sent home with a student if the parent's address is found to be invalid.

(b) If the parent is unable to submit the ballot in person at the school site, he or she may put the sealed ballot in another envelope, sign the seal of the outside envelope, and mail the ballot to the school. The parent shall include identification on the outer envelope such as a return address to ensure only one ballot is submitted per household. If the ballot is submitted improperly, it shall not be counted.

(c) A teacher who is also the parent of a student enrolled in the school shall be allowed to submit both a teacher ballot and the parent ballot submitted for the household.

(d) A majority of parents eligible to vote must participate in the ballot process pursuant to section 1002.33(3)(b), F.S.; therefore, for purposes of this rule, a majority is more than half.

Rulemaking Authority 1002.33(28) FS. Law Implemented 1002.33(3)(b) FS. History–New 6-22-10.

The 2018 Florida Statutes

Title XLVIII

K-20 EDUCATION CODE

Chapter 1002

STUDENT AND PARENTAL RIGHTS AND EDUCATIONAL CHOICES

View Entire Chapter

1002.33 Charter schools.—

(1) AUTHORIZATION.—All charter schools in Florida are public schools and shall be part of the state's program of public education. A charter school may be formed by creating a new school or converting an existing public school to charter status. A charter school may operate a virtual charter school pursuant to s. 1002.45(1)(d) to provide full-time online instruction to students, pursuant to s. 1002.455, in kindergarten through grade 12. The school district in which the student enrolls in the virtual charter school shall report the student for funding pursuant to s. 1011.61(1)(c)1.b.(VI), and the home school district shall not report the student for funding. An existing charter school that is seeking to become a virtual charter school must amend its charter or submit a new application pursuant to subsection (6) to become a virtual charter school. A virtual charter school is subject to the requirements of this section; however, a virtual charter school is exempt from subsections (18) and (19), paragraph (20)(c), and s. 1003.03. A public school may not

use the term charter in its name unless it has been approved under this section.

(2) GUIDING PRINCIPLES; PURPOSE.—

(a) Charter schools in Florida shall be guided by the following principles:

1. Meet high standards of student achievement while providing parents flexibility to choose among diverse educational opportunities within the state's public school system.

2. Promote enhanced academic success and financial efficiency by aligning responsibility with accountability.

3. Provide parents with sufficient information on whether their child is reading at grade level and whether the child gains at least a year's worth of learning for every year spent in the charter school.

(b) Charter schools shall fulfill the following purposes:

1. Improve student learning and academic achievement.

2. Increase learning opportunities for all students, with special emphasis on low-performing students and reading.

3. Encourage the use of innovative learning methods.

4. Require the measurement of learning outcomes.

(c) Charter schools may fulfill the following purposes:

1. Create innovative measurement tools.

2. Provide rigorous competition within the public school district to stimulate continual improvement in all public schools.

3. Expand the capacity of the public school system.

4. Mitigate the educational impact created by the development of new residential dwelling units.

5. Create new professional opportunities for teachers, including ownership of the learning program at the school site.

(3) APPLICATION FOR CHARTER STATUS.—

(a) An application for a new charter school may be made by an individual, teachers, parents, a group of individuals, a municipality, or a legal entity organized under the laws of this state.

(b) An application for a conversion charter school shall be made by the district school board, the principal, teachers, parents, and/or the school advisory council at an existing public school that has been in operation for at least 2 years prior to the application to convert. A public school-within-a-school that is designated as a school by the district school board may also submit an application to convert to charter status. An application submitted proposing to convert an existing public school to a charter school shall demonstrate the support of at least 50 percent of the teachers employed

at the school and 50 percent of the parents voting whose children are enrolled at the school, provided that a majority of the parents eligible to vote participate in the ballot process, according to rules adopted by the State Board of Education. A district school board denying an application for a conversion charter school shall provide notice of denial to the applicants in writing within 10 days after the meeting at which the district school board denied the application. The notice must articulate in writing the specific reasons for denial and must provide documentation supporting those reasons. A private school, parochial school, or home education program shall not be eligible for charter school status.

(4) UNLAWFUL REPRISAL.—

(a) No district school board, or district school board employee who has control over personnel actions, shall take unlawful reprisal against another district school board employee because that employee is either directly or indirectly involved with an application to establish a charter school. As used in this subsection, the term "unlawful reprisal" means an action taken by a district school board or a school system employee against an employee who is directly or indirectly involved in a lawful application to establish a charter school, which occurs as a direct result of that involvement, and which results in one or more of the following: disciplinary or corrective action; adverse transfer or reassignment, whether temporary or permanent; suspension, demotion, or dismissal; an unfavorable

performance evaluation; a reduction in pay, benefits, or rewards; elimination of the employee's position absent of a reduction in workforce as a result of lack of moneys or work; or other adverse significant changes in duties or responsibilities that are inconsistent with the employee's salary or employment classification. The following procedures shall apply to an alleged unlawful reprisal that occurs as a consequence of an employee's direct or indirect involvement with an application to establish a charter school:

1. Within 60 days after the date upon which a reprisal prohibited by this subsection is alleged to have occurred, an employee may file a complaint with the Department of Education.

2. Within 3 working days after receiving a complaint under this section, the Department of Education shall acknowledge receipt of the complaint and provide copies of the complaint and any other relevant preliminary information available to each of the other parties named in the complaint, which parties shall each acknowledge receipt of such copies to the complainant.

3. If the Department of Education determines that the complaint demonstrates reasonable cause to suspect that an unlawful reprisal has occurred, the Department of Education shall conduct an investigation to produce a fact-finding report.

4. Within 90 days after receiving the complaint, the Department of Education shall provide the district school superintendent of the complainant's district and the complainant with a fact-finding report that

may include recommendations to the parties or a proposed resolution of the complaint. The fact-finding report shall be presumed admissible in any subsequent or related administrative or judicial review.

5. If the Department of Education determines that reasonable grounds exist to believe that an unlawful reprisal has occurred, is occurring, or is to be taken, and is unable to conciliate a complaint within 60 days after receipt of the fact-finding report, the Department of Education shall terminate the investigation. Upon termination of any investigation, the Department of Education shall notify the complainant and the district school superintendent of the termination of the investigation, providing a summary of relevant facts found during the investigation and the reasons for terminating the investigation. A written statement under this paragraph is presumed admissible as evidence in any judicial or administrative proceeding.

6. The Department of Education shall either contract with the Division of Administrative Hearings under s. 120.65, or otherwise provide for a complaint for which the Department of Education determines reasonable grounds exist to believe that an unlawful reprisal has occurred, is occurring, or is to be taken, and is unable to conciliate, to be heard by a panel of impartial persons. Upon hearing the complaint, the panel shall make findings of fact and conclusions of law for a final decision by the Department of Education.

It shall be an affirmative defense to any action brought pursuant to this section that the adverse action was

predicated upon grounds other than, and would have been taken absent, the employee's exercise of rights protected by this section.

(b) In any action brought under this section for which it is determined reasonable grounds exist to believe that an unlawful reprisal has occurred, is occurring, or is to be taken, the relief shall include the following:

1. Reinstatement of the employee to the same position held before the unlawful reprisal was commenced, or to an equivalent position, or payment of reasonable front pay as alternative relief.

2. Reinstatement of the employee's full fringe benefits and seniority rights, as appropriate.

3. Compensation, if appropriate, for lost wages, benefits, or other lost remuneration caused by the unlawful reprisal.

4. Payment of reasonable costs, including attorney's fees, to a substantially prevailing employee, or to the prevailing employer if the employee filed a frivolous action in bad faith.

5. Issuance of an injunction, if appropriate, by a court of competent jurisdiction.

6. Temporary reinstatement to the employee's former position or to an equivalent position, pending the final outcome of the complaint, if it is determined that the action was not made in bad faith or for a wrongful purpose, and did not occur after a district school board's initiation of a personnel action against the employee

that includes documentation of the employee's violation of a disciplinary standard or performance deficiency.