RUTH JOHNSON,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
PRINCE GEORGE'S COUNTY BOARD OF EDUCATION	OF EDUCATION
Appellee.	Opinion No. 16-47

OPINION

INTRODUCTION

Ruth Johnson (Appellant) appeals the decision of the Board of Education for Prince George's County (local board) upholding her termination as a school guidance counselor based on willful neglect of duty. We referred this case to the Office of Administrative Hearings (OAH) as required by COMAR 13A.01.05.07A(2).

On March 14, 2016, the Administrative Law Judge (ALJ) issued a proposed decision recommending that the State Board uphold the local board's termination decision. The Appellant filed exceptions to the proposed decision and the local board responded. Oral argument before the State Board was held on October 25, 2016.[1]

FACTUAL BACKGROUND[2]

Appellant was a certified and tenured guidance counselor for Prince George's County Public Schools (PGCPS). She initially worked for the school system from 1970 to 1978 and returned to the school system in 2003, where she was employed as a school counselor. During the 2010-2011 school year, Appellant was assigned to Bladensburg High School (Bladensburg). (ALJ Proposed Decision, at 8).

On November 18, 2011, Principal Glynis Jordan asked Appellant to update a Section 504 Plan for student A.C. Section 504 of the Rehabilitation Act of 1973 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal funding through the U.S. Department of Education. School systems must ensure that qualified students with disabilities receive a free appropriate public education, which includes the provision of regular or special education instruction and related aids and services designed to meet the student's individual education needs in the same manner as a nondisabled student. To comply with the law, PGCPS develops a Section 504 Plan for each student identified as disabled under Section 504. (ALJ Proposed Decision, at 9; Local Board's Exceptions, Ex. 2).

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[1] Oral argument was originally scheduled for July 2016. At the request of Appellant, it was rescheduled to October based on the availability of counsel.

[2] The factual background is drawn from the proposed findings of fact as found by the ALJ, as well as the documents contained in the record.

A.C. had a diagnosis of attention deficit hyperactivity disorder and his Section 504 Plan was last reviewed on December 14, 2010. In response to the principal's request, Appellant placed A.C.'s name on the agenda for an upcoming School Instructional Team (SIT) meeting. (ALJ Proposed Decision, at 9).

On November 30, 2011, Appellant met with five other school counselors, a school nurse, an English-As-A-Second Language crisis coordinator, and a pupil personnel worker as part of the SIT meeting. A.C. was among the students discussed by the group. The notes of the meeting state the reason for A.C.'s referral as: "ADHD. New medical report has been received. Student does not attend school regularly." The notes further state that A.C. and his parent would be advised of other options for continuing his education. Neither A.C., his parents, or any of his teachers attended the meeting. After the November 30 SIT meeting, Appellant prepared an updated Section 504 Plan for A.C. No separate Section 504 Plan meeting for A.C. was held. (ALJ Proposed Decision, at 9; Appellant Hearing Exhibits, Ex. 21).

On February 2, 2012, Principal Jordan asked Appellant to provide her with a copy of A.C.'s completed Section 504 Plan. Appellant told Principal Jordan that she was still attempting to obtain a signature from A.C.'s parent. On February 6, 2012, A.C.'s mother signed the updated Section 504 Plan. Appellant provided the signed plan to an assistant principal who sent the plan to Principal Jordan. (ALJ Proposed Decision, at 9-10).

On February 8, 2012, Appellant received a calendar invitation through email to a meeting titled "*Loudermill* w/PGCEA," scheduled for February 16 at the school system administration building.[3] The meeting was described as "Regarding 504 Plan." Appellant emailed Principal Jordan seeking additional information about the meeting and was referred to James Whattam, the school system's director of employee and labor relations. Another school system employee informed Appellant that she would be provided with information about the charges against her and supporting documentation at the meeting, and would have the opportunity to make a written and oral response. (ALJ Proposed Decision, at 10).

On February 10, 2012, and again on February 11, Appellant emailed Mr. Whattam seeking information about what Section 504 Plan would be discussed and requesting a postponement. Appellant also informed Mr. Whattam that her assigned union representative was a defendant in a lawsuit in which Appellant was the plaintiff. (ALJ Proposed Decision, at 10).

On February 12, 2012, Mr. Whattam responded by email to Appellant's questions. He stated the following: "The due process meeting is intended to address the legitimacy of a 504 plan you prepared dated 11/30/11 for student A.C. The details of our concerns about that document will be shared with you at the scheduled due process meeting, which will not be postponed."

On February 13, 2012, Appellant emailed Mr. Whattam thanking him for the information. She did not request any further information at that time, but did reiterate her concerns about her union representative and informed him that she would bring her own legal counsel to the

[3] At a *Loudermill* conference, also known as a pre-termination hearing, employees are given notice of the charges against them and provided with an opportunity to respond. The conference is named for the Supreme Court's decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). PGCEA stands for the Prince George's County Educators' Association, a union representing teachers and other school system personnel.

meeting. Mr. Whattam told her by email that she would need to address her concerns about union representation with the union and that her legal counsel could attend the meeting, but would not be allowed to participate. (ALJ Proposed Decision, at 11).

The *Loudermill* meeting took place on February 16, 2012. Appellant did not have a union representative during the meeting, but her legal counsel was present. At the meeting, school personnel informed Appellant that she was accused of failing to hold a Section 504 Plan meeting for A.C. and forging the Section 504 Plan she submitted to Principal Jordan. The school system presented documents from other school employees stating that they did not attend a Section 504 meeting for A.C. (ALJ Proposed Decision, at 11-12).

Appellant did not respond to the charges at the *Loudermill* meeting but later issued a written response in which she argued that the pre-termination hearing was flawed because she did not have adequate notice of the charges and was not provided with documents used by the school system in advance of the hearing. As to the merits, Appellant argued that A.C. was not part of her caseload and she denied forging signatures on his 504 Plan. She acknowledged that she never convened a separate Section 504 Plan meeting, but argued that the SIT meeting on November 30, 2011 was when A.C.'s "situation was discussed and decisions developed about his Section 504 Accessibility Plan." Finally, Appellant argued that the school administrator who chairs a Section 504 Plan meeting is responsible for the Section 504 plan, not her. (ALJ Proposed Decision, at 11-12; Appellant Hearing Exhibits, Ex. 30).

On March 21, 2012, the local superintendent recommended that Appellant be terminated based on misconduct in office and willful neglect of duty. She was placed on administrative leave without pay pending final action by the local board. Appellant appealed the recommendation and the local board referred the matter to a hearing examiner. (ALJ Proposed Decision, at 12).

A hearing was held over two days in June and July 2014.[4] Appellant was represented by counsel during the hearing and testified on her own behalf. On September 28, 2014, the Hearing Examiner recommended that the local board terminate Appellant for willful neglect of duty.[5]

The local board heard oral argument from the parties on June 23, 2015.[6] On July 15, 2015, the local board adopted the Hearing Examiner's recommendation. The local board concluded that the Appellant received due process throughout her termination because she was provided notice of the charges and an opportunity to be heard. The local board found that Appellant failed to schedule a Section 504 Plan meeting as required by her principal, that she updated the plan using only information contained in the student's prior records, and that she listed the names of individuals who participated in the SIT meeting as having participated in the

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[4] The record indicates that the delay in conducting the hearing occurred in part because the initial Hearing Examiner assigned to the case retired prior to conducting the hearing. Appellant also obtained new legal counsel during that period of time. (Local Board Decision).

[5] The Hearing Examiner did not recommend that Appellant be terminated for misconduct in office and that ground was not a basis for the local board's decision.

[6] The local board attributes this delay to the difficulty of coordinating schedules between the local board and Appellant's attorney.

Section 504 Plan meeting when they did not. The local board concluded that this constituted willful neglect of duty. (Local Board Decision).

Appellant timely appealed to the State Board, which referred the matter to the Office of Administrative Hearings. On October 9, 2015, the local board filed a motion for summary affirmance, which the ALJ ultimately denied. The ALJ granted, however, a motion by Appellant to supplement the record. On December 14, 2015, the ALJ conducted a hearing during which Appellant was permitted to produce additional evidence concerning alleged procedural defects in her pre-termination hearing. (ALJ Proposed Decision, at 2).

On March 14, 2016, the ALJ issued a proposed decision in which she recommended upholding the local board's termination decision. The ALJ concluded that the Appellant was not denied due process during her pre-termination hearing because she was provided sufficient notice of the charges against her, had the opportunity to respond to those charges, and had significant post-termination protections available to her. As to the merits of her termination, the ALJ found that the local board had not proven by a preponderance of the evidence that Appellant willfully falsified A.C.'s Section 504 Plan. The ALJ concluded, however, that Appellant committed willful neglect of duty by failing to schedule a Section 504 Plan meeting for A.C. (ALJ's Proposed Decision, at 12-25).

Appellant filed exceptions to the proposed decision and the local board responded. Oral argument was held on October 25, 2016.

STANDARD OF REVIEW

Because this appeal involves the termination of a certificated employee pursuant to '6-202 of the Education Article, the State Board exercises its independent judgment on the record before it in determining whether to sustain the termination. COMAR 13A.01.05.05F(1) and F(3).

The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications, or amendments to the proposed decision. *See* Md. Code Ann., State Gov't '10-216. In reviewing the ALJ's proposed decision, the State Board must give deference to the ALJ's demeanor based credibility findings unless there are strong reasons present that support rejecting such assessments. *See Dept. of Health & Mental Hygiene v. Shrieves,* 100 Md. App. 283, 302-303 (1994).

LEGAL ANALYSIS

Appellant raises two exceptions to the ALJ's proposed decision, which we shall address in turn.

Due process during pre-termination hearing

Appellant argues that she was denied due process as part of her pre-termination hearing because (1) she did not receive a timely written explanation of the basis for the proposed

termination; (2) she was not provided in advance with copies of documents to be used at the pre-termination hearing; and (3) she was not permitted to have her attorney provide legal representation.

In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), the U.S. Supreme Court ruled that the "essential requirements of due process" prior to the termination of a tenured public employee were "notice and an opportunity to respond" at an informal hearing. *Id.* at 546. The notice may be "oral or in writing." *Id.*; *see also Mobley v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-09 (2015). Notice is sufficient "if it apprises the vulnerable party of the nature of the charges and general evidence against him, and . . . if it is timely under the particular circumstances of the case." *Linton v. Frederick County*, 964 F.2d 1436, 1439 (4th Cir. 1992) (quoting *Gniotek v. City of Philadelphia*, 808 F.2d 241, 244 (3d Cir. 1986)). Lack of advance notice "does not constitute a per se violation of due process." *Gniotek*, 808 F.2d at 244; *see also Schmidt v. Creedon*, 639 F.3d 587, 597 (3d Cir. 2011) ("An employee is generally not entitled to notice of the reasons for his discharge in advance of a [Loudermill-type] hearing.").

Appellant learned through email that the *Loudermill* meeting was "intended to address the legitimacy of a 504 plan" Appellant prepared for student A.C. At the meeting itself, she was presented with the allegations against her and the documents that supported the school system's concerns. Appellant issued a written response to the charges five days after the hearing. The ALJ concluded, and we agree, that this process provided Appellant with sufficient notice of the "nature of the charges and general evidence" against her, as well as an opportunity to adequately respond to those charges.[7]

Appellant also argued that her due process rights were violated because her attorney was not permitted to participate in the hearing. The ALJ concluded that Appellant had no right to have an attorney represent her in the pre-termination and that, even if she did have such a right, that Appellant's attorney would not have been able to do so because she was not licensed to practice law in Maryland.[8] We agree with the ALJ's analysis.

Even if the school system had failed to provide due process during the pre-termination hearing, and we do not conclude that it did, the full evidentiary hearing before the local board's hearing examiner (at which Appellant was represented by counsel) cured any procedural errors. *See Mobley v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-09 (2015) (citing cases).

Willful neglect of duty

Appellant argues that she did not commit willful neglect of duty by failing to schedule a Section 504 Plan meeting for A.C. In support, Appellant contends that (1) she had no authority to call a Section 504 team meeting; (2) the school administrator is the chair of the Section 504 team and assumes "all obligations and responsibilities" for the plan; and (3) Appellant did not

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[7] The ALJ also concluded that the original notice of the *Loudermill* hearing, which came in the form of a calendar invitation stating "*Loudermill* w/PGCEA" and "Regarding 504 Plan" was vague and non-specific. (ALJ Proposed Decision, at 15). We agree that the better practice is to provide the type of information contained in Mr. Whattam's follow-up email responding to Appellant's questions, in which he identified the specific student at issue and informed her the meeting would concern the "legitimacy" of the Section 504 Plan.

[8] Appellant has retained a different attorney for this appeal.

violate PGCPS policy by not convening a Section 504 meeting and instead updating the plan through a SIT meeting that did not include A.C., his parents, or his teachers.

In the education context, the State Board has defined willful neglect of duty as occurring "when the employee has willfully failed to discharge duties which are regarded as general teaching responsibilities." *Baylor v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 13-11 (2013). It is an intentional failure to perform some act or function that the person knows is part of his or her job. *See Lasson v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-21 (2015).

PGCPS Administrative Procedure 5146, issued on March 1, 2006, outlines the requirements for implementing Section 504. It specifically states that "[a] student's Section 504 Plan shall be reviewed and revised, as appropriate, at least annually, or sooner at the request of a parent or teacher. The parent shall be provided with written notification of the review meeting." The Section 504 team includes "the school administrator or designee, parents, the student's teacher, guidance counselor, and the student, as appropriate." The procedure further states that "[t]he school administrator shall assume all obligations and responsibilities as Chairperson of the Section 504 Team." (Local Board Response, Ex. 2, at 4).

A memorandum issued to all school counselors from Karyn Lynch, Chief of Student Services, on February 22, 2011 offered clarification on the Section 504 procedure:

> This memorandum serves as a reminder for all Professional School Counselors to closely monitor the implementation of Section 504 plans for every student receiving Section 504 services. Section 504 plans, at a minimum, must be reviewed annually. All Section 504 team members must be involved in the annual review meeting and parents, in accordance with the law, must be strongly encouraged to attend. If a parent cannot attend after reasonable attempts have been made, the meeting should proceed. Professional School Counselors must speak with each teacher, school nurse and any staff member involved with the student to assess the progress of each student receiving Section 504 services. It is imperative that all staff involved with the student are informed of the Section 504 plan and are currently implementing the services. Parents are required to receive a notification letter when Section 504 Plans have been reviewed for the academic year. The Professional School Counselor or the Principal designee is responsible for sending the notification letter to the parent.

(Local Board Response, Ex. 3).

Finally, the local superintendent sent a memorandum to all school counselors on June 6, 2011 reminding staff of the procedures outlined in PGCPS Administrative Procedure 5146. The memo includes the following provisions:

> 4. A meeting must be held with the student's teachers and other staff (if relevant) at the beginning of each new school year to review the accommodation plan for each student receiving Section 504 services to ensure that the student is receiving a Free and Appropriate Public Education (FAPE).

> 5. If a parent or school based staff request a review of services anytime during the school year, a meeting must be held to review or if deemed appropriate, to amend the Section 504 plan. Appropriate documentation (i.e. medical or psychological) must be provided to substantiate changes in a Section 504 plan.
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> * * *
>
> 13. Section 504 plans must be updated annually and students with a 504 Plan must be reevaluated every three years to determine if the student is eligible to continue to receive services.

(Local Board Response, Ex. 4).

Appellant acknowledges being aware of PGCPS Administrative Procedure 5146, but maintains that an annual review did not require convening the Section 504 team. She testified during the hearing that the practice at Bladensburg allowed for Section 504 Plan reviews to be made based on discussions at SIT meetings. In her exceptions, Appellant argues that the process she followed was authorized by the local superintendent's June 6, 2011 memo. She appears to argue that the reference in paragraph 5 of the memo to "a meeting" allows for the SIT team to meet, rather than the Section 504 team. Additionally, Appellant contends that a Section 504 team meeting is "held once when a student is admitted to the program and when he/she exits the program," not annually. (Appellant's Exceptions).

The ALJ found that Appellant provided "confused" and "not credible" testimony because of differing statements she made about the requirements for Section 504 Plan reviews. Reviewing her exceptions, we agree that Appellant's argument is contradicted by the plain language of PGCPS's policies. Those policies require annual reviews and identify the members of a Section 504 team as including teachers, parents, and the student. Nowhere in the PGCPS policies does it state that a SIT team may review and update a Section 504 Plan without any input from a student's current teachers and parents. As one of the school system's witnesses explained during the hearing, classroom teachers and parents are both vital members of a Section 504 team. Classroom teachers are often the chief ones responsible for implementing the plans and can offer advice on what has, and has not, worked for a student in the classroom. Parents, likewise, are experts on the student and his or her behavior and challenges, and they have a right to know what is occurring in school. (ALJ Proposed Decision, at 23). In our view, updating a Section 504 Plan without convening these team members was an "intentional failure to perform some act or function" that Appellant knew was a part of her job.

Finally, Appellant argues that student A.C. was not originally part of her case load and that the school administrator, rather than Appellant, should have been the one to convene a Section 504 team meeting. Principal Johnson assigned student A.C. to Appellant in November 2011. The record indicates that school counselors in PGCPS routinely organize Section 504 meetings by inviting participants and leading the meetings. (ALJ Proposed Decision, at 24). Although Appellant argues that PGCPS policy designates the administrator as the chair of the team who assumes "all obligations and responsibilities," Appellant was tasked with setting up the meeting for A.C. and agreed to do so. If Appellant truly did not believe she had the authority to convene a Section 504 team meeting, she would have raised that issue at the time Principal

Johnson assigned her the duty. In our view, Principal Johnson's assignment of the task to Appellant was a reasonable one and in line with her general job responsibilities.

CONCLUSION

For all of the foregoing reasons, we deny Appellant's exceptions and concur with the ALJ that the local board's decision to terminate the Appellant should be upheld. We, therefore, adopt the ALJ's proposed decision, with the inclusion of the additional legal analysis offered in this opinion, and affirm the local board's termination for willful neglect of duty.

Andrew R. Smarick
President

Chester E. Finn, Jr.

Michele Jenkins Guyton

Laurie Halverson

Stephanie R. Iszard

Guffrie M. Smith, Jr.

Laura Weeldreyer

Dissent:

S. James Gates, Jr.
Vice-President

Jannette O'Neill-González

Barbara J. Shreeve

Madhu Sidhu

October 25, 2016

RUTH JOHNSON,	*	**BEFORE EMILY DANEKER,**
APPELLANT,	*	**ADMINISTRATIVE LAW JUDGE,**
v.	*	**MARYLAND OFFICE OF**
BOARD OF EDUCATION FOR	*	**ADMINISTRATIVE HEARINGS**
PRINCE GEORGE'S COUNTY,	*	**OAH No.: MSDE-BE-01-15-27780**
APPELLEE.	*	

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PROPOSED DECISION

STATEMENT OF THE CASE

Ruth Johnson, Ph.D., (Appellant) was a tenured and certificated guidance counselor in the Prince George's County Public Schools (PGCPS), assigned to Bladensburg High School (Bladensburg). On March 21, 2012, the Superintendent of Schools for PGCPS (Superintendent) notified the Appellant that he was recommending that her employment be terminated for misconduct in office and willful neglect of duty, under section 6-202 of the Education article of the Maryland Code (Supp. 2012). The Appellant timely appealed the Superintendent's recommendation. A motions hearing and a two-day evidentiary hearing were held before Jerome Stanbury, Esq., a hearing examiner (Hearing Examiner) for the Board of Education for Prince George's County (Local Board). The Hearing Examiner recommended that the termination be upheld. On July 15, 2014, the Local Board issued an Order upholding the Superintendent's decision and terminating the Appellant's employment for willful neglect of duty. This appeal to

the State Board of Education (State Board) followed. Md. Code Ann., Educ. § 6-202(a)(4) (Supp. 2015).

The State Board referred the appeal to the Office of Administrative Hearings (OAH) for a hearing, pursuant to Code of Maryland Regulations (COMAR) 13A.01.05.07A(2). Thereafter, on October 9, 2015, the Local Board filed a Motion for Summary Affirmance. Also on October 9, 2015, the Appellant filed a Motion to Supplement the Record (Motion to Supplement), requesting that she be permitted to testify concerning alleged procedural deficiencies in her pre-termination hearing. On October 26, 2015, the Appellant filed an Opposition to the Local Board's Motion for Summary Affirmance and the Local Board filed an Opposition to the Appellant's Motion to Supplement the Record. On November 10, 2015, I denied the Motion for Summary Affirmance, without prejudice, and granted the Appellant's Motion to Supplement, COMAR 13A.01.05.04C; COMAR 13A.01.05.07C.

I held a hearing in this matter on December 14, 2015 at the PGCPS's Sasscer Administration Building, in Upper Marlboro, Maryland. The Appellant was represented by attorney Donna M. Beasley. The Local Board was represented by its Associate General Counsel, Shani K. Whisonant. Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the State Board of Education, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.01.05; COMAR 28.02.01.

ISSUES

1. Was the Appellant provided with due process by way of a pre-termination hearing under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)?
2. Did the Local Board properly terminate the Appellant, as set forth in its notice of action?

SUMMARY OF THE EVIDENCE

Exhibits

With the exception of the *Loudermill*, *supra*, issue, the hearing was limited to argument on the record developed before the hearing examiner. Accordingly, a copy of the exhibits presented during the hearing before the Hearing Examiner, as well as a transcript of that hearing, was made a part of the record. COMAR 13A.01.05.07B. The following is a list of documents constituting the record:[1]

Letter from Segun C. Eubanks, Ed.D., Local Board, to counsel for the Appellant, June 15, 2015

Letter from Dr. Eubanks to counsel for the Appellant, May 1, 2015

Letter from Abbey G. Hairston, Counsel to the Local Board, to Christine C. Hostetter, Disability Unit, Member Services, Maryland State Retirement and Pension System, March 7, 2014

Letter from Ms. Hostetter to Verjeana Jacobs, Chair of the Local Board, February 12, 2014

Letter from Ms. Jacobs to F. Robert Troll, Jr., Esq., March 26, 2012

Letter from William Hite, Ed.D., Superintendent of PGCPS, to the Appellant, March 21, 2012

Letter from Dr. Eubanks to the Hearing Examiner, February 12, 2014

Letter from counsel for the Appellant to Lori Anderson, Executive Secretary to the Local Board, May 3, 2012

Letter from the Appellant to Ms. Anderson, undated

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[1] The Local Board bears responsibility for preparing and submitting the record. COMAR 13A.01.05.07B(1). The material submitted by the Local Board, without so much as a cover letter, was a hodgepodge of unorganized documents, most of which were not identified with hearing exhibit numbers. Further, it was not clear that the Local Board provided all of the material that was submitted to the Hearing Examiner. Additionally, some of the documents submitted by the Local Board did not seem to be clearly part of the record in this matter, such as February and March 2014 correspondence related to the Appellant's request for disability retirement benefits and a December 2014 settlement agreement resolving a separate dispute between the parties. The Appellant, however, did not voice any objection to the inclusion of this material in the record prepared by the Local Board.

On September 8, 2015, the Appellant submitted a binder containing numbered and identified copies of the exhibits she submitted to the Hearing Examiner. Given the state of the material submitted by the Local Board, I also relied upon the material identified in the Appellant's binder in determining what material constituted the record.

Letter from Prince George's County Educators' Association (Union) to Ms. Anderson, March 23, 2012

Appellant's Motion to Dismiss Appeal, May 15, 2014, with the following attachments:

- Email chain between the Appellant and Traketa Wray, PGCPS, and Jimalatice Thomas, Union, February 9 and 10, 2012
- Email from the Appellant to James Whattam, PGCPS, February 10, 2012
- Email from the Appellant to Mr. Whattam, February 11, 2012
- Email chain among the Appellant, Mr. Whattam, and Ms. Wray, February 13, 2012
- Letter from Dr. Hite to the Appellant, March 21, 2012
- Affidavit of the Appellant, May 15, 2014

The Local Board's Opposition to Motion to Dismiss Appeal, May 29, 2014, with the following attachments:

- Email chain between Mr. Whattam, the Appellant, and Ms. Wray, February 11 and 12, 2012
- Email invitation (*Loudermill* Invitation), from Colleen Prout, PGCPS, to the Appellant, Ms. Wray, Ms. Thomas, Elizabeth Sessoms, PGCPS, and Glynis Jordan, PGCPS
- Electronic meeting response for Ms. Wray, undated
- *Loudermill* conference sign-in sheet, February 16, 2012
- Verification of *Loudermill* discussion, February 16, 2012

Hearing Examiner's Ruling on Motion to Dismiss, June 15, 2014

Appellant's Post-Hearing Brief, September 9, 2014

Post-Hearing Memorandum on Behalf of the Chief Executive Officer of Schools for the PGCPS, September 9, 2014, with the following attachments:

- Letter from Dr. Hite to the Appellant, March 21, 2012
- PGCPS Administrative Procedure No. 5146, March 1, 2006
- Hearing transcript, June 25, 2014
- Hearing transcript, July 1, 2014
- Bladensburg Handbook, Instructional & Support Team, school year 2011-2012 (marked as CEO Ex. 8A)
- Bladensburg Handbook, School Community, undated (marked as CEO Ex. 8A, amended)
- PGCPS Section 504 Accessibility Plan for student A.C.,[2] December 14, 2010
- Bladensburg School Instructional Team Agenda, November 30, 2011 (marked as CEO Ex. 11)
- Email from Ms. Jordan to the Appellant, February 2, 2012
- PGCPS Testing Accommodations for Section 504 Students, for student A.C., February 6, 2012

[2] For confidentiality purposes, the student will be identified only by his initials.

- PGCPS Section 504 Accessibility Plan for student A.C., November 30, 2011 (marked as CEO Ex. 3)
- PGCPS Testing Accommodations for Section 504 Students, for student A.C., November 30, 2011
- Responses of Deborah Kirk, Gillian Caruth-Hunt, Veronica Thomas, Consuela Pettigrew, Janiene Dickerson, and Cheyonne Christian to Bladensburg Administrative Memorandum, all undated (marked as CEO Ex. 9)
- Email chain between Ms. Jordan and Bladensburg Administrators, February 3, 2012
- Email chain among Ms. Jordan, the Appellant, Ms. Dickerson, and Ms. Caruth-Hunt, March 1, 2012
- Sample letter for review of Section 504 Plan, undated (marked as CEO Ex. 12)

PGCPS Bulletin, Section 504 Procedures, June 6, 2011

PGCPS Memorandum to all Principals, Professional School Counselors, and School Nurses, February 22, 2011

Recommendation of the Hearing Examiner, September 28, 2014

Confidential Settlement Agreement between the Appellant and the Local Board, related to Case No. 8:11-cv-01195 in the United States District Court for the District of Maryland, December 2, 2014

Order of the Local Board, July 15, 2015

App. Ex. 1[3] - PGCPS Administrative Procedure No. 5146, March 1, 2006

App. Ex. 2 - PGCPS Section 504 Accessibility Plan and PGCPS Testing Accommodations for Section 504 Students, both for student A.C., December 14, 2010

App. Ex. 3 - PGCPS Section 504 Accessibility Plan and PGCPS Testing Accommodations for Section 504 Students, both for student A.C., November 30, 2011

App. Ex. 4 - Bladensburg School Instructional Team Agenda and attendance sheet, November 30, 2011

App. Ex. 5 - Letter from Dr. Hite to the Appellant, March 21, 2012

[3] The remaining documents were provided by the Appellant under cover of a September 8, 2015 letter. The Local Board did not voice any objection to the Appellant's provision of these documents, at least some of which are duplicative of material submitted by the Local Board.

App. Ex. 6 - Email chain between Ms. Jordan and Bladensburg Administrators, February 3, 2012

App. Ex. 7 - Responses of Deborah Kirk, Gillian Caruth-Hunt, Veronica Thomas, Consuela Pettigrew, Janiene Dickerson, and Cheyonne Christian to Bladensburg Administrative Memorandum, all undated

App. Ex. 8 - Email chain between Mr. Whattam, Ms. Wray, Ms. Jordan, and Jeanine Cadet, February 7, 2012

App. Ex. 9 - PGCPS Office of Student Records, Log of Review for student A.C., with dates between 2008 and 2012

App. Ex. 10 - Email from Bernadette Aisha Mahoney, Assistant Principal at Bladensburg, to Ms. Jordan, February 6, 2012, with attached memorandum

App. Ex. 11 - Email from Ms. Jordan to the Appellant, February 2, 2012

App. Ex. 12 - Email from Ms. Jordan to the Appellant, February 3, 2012

App. Ex. 13 - Email chain between Ms. Jordan and Dr. Hite, February 3, 2012

App. Ex. 14 - Email chain between Ms. Jordan and Mr. Whattam, February 5 and 6, 2012

App. Ex. 15 - Email chain among Ms. Jordan, Mr. Whattam, and Dr. Hite, February 6, 2012, with attachments

App. Ex. 16 - PGCPS Section 504 Accessibility Plan and PGCPS Testing Accommodations for Section 504 Students, both for student A.C., November 30, 2011

App. Ex. 17 - PGCPS Section 504 Accessibility Plan and PGCPS Testing Accommodations for Section 504 Students, both for student A.C., November 30, 2011

App. Ex. 18 - PGCPS Section 504 Accessibility Plan and PGCPS Testing Accommodations for Section 504 Students, both for student A.C., November 30, 2011

App. Ex. 19 - PGCPS Section 504 Accessibility Plan and PGCPS Testing Accommodations for Section 504 Students, both for student A.C., February 6, 2012; email from Ms. Jordan to Ms. Mahoney, February 6, 2012, with attached memorandum

App. Ex. 20 - Message to "Jim" from "Ms. Hamlin," March 19, 2012

App. Ex. 21 - Bladensburg School Instructional Team Agenda and attendance sheets, November 30, 2011; PGCPS Section 504 Accessibility Plan for student A.C., November 30, 2012

App. Ex. 22 - Email chain between Mr. Whattam and Ms. Jordan, February 6, 2012, with handwritten notes

App. Ex. 23 - Email chain from Ms. Christian to Gordon Gainer, Shannon Reed, Valerie Richardson, Kenneth Plummer, Troy Alston, Donna Stancell, Marcelle Kenny, Michael Fitzhugh, all with PGCPS, and the Appellant, October 11, 2011; PGCPS Testing Accommodations for Section 504 Students and PGCPS Section 504 Accessibility Plan both for student A.C., December 14, 2010; Counselor Assignments, August 9, 2011; Student Distribution for Administrators and Counselors, August 14, 2011; Counseling Department Assignments, August 18, 2011

App. Ex. 24 - Email from Ms. Wray to Mr. Whattam, forwarding email from Ms. Mahoney to the Appellant, February 7, 2012

App. Ex. 25 - Emails among Ms. Jordan, the Appellant, Ms. Caruth-Hunt, and Ms. Dickerson, March 1, 20112; PGCPS Office of Student Records, Log of Review for student A.C., with dates between 2008 and 2012

App. Ex. 26 - PGCPS Administrative Procedure No. 5124, November 1, 2009

App. Ex. 27 - PGCPS Discrimination or Harassment Incident Report, filed by the Appellant, October 30, 2008; Letter from Pamela Harris, Equity Assurance Officer, PGCPS, to the Appellant, April 5, 2011

App. Ex. 28 - Bladensburg form BHS 17; SIT Referral Form; 504 Team Meeting-Teacher's Input Form; PGCPS Section 504 Accessibility Plan; PGCPS Testing Accommodations for Section 504 Students; PGCPS Bulletin, June 6, 2011; Sample letter for review of Section 504 Plan; PGCPS Memorandum, February 22, 2011

App. Ex. 29 - PGCPS Section 504 Accessibility Plan Record; 504 Team Meeting-Teacher's Input Form; PGCPS Procedural Safeguards: Section 504; PGCPS Section 504 Accessibility Plan; PGCPS Section 504 Procedural Safeguards Receipt; PGCPS Parent/Guardian Notification of Section 504 Meeting; PGCPS Section 504 Summary of Meeting; Test Accommodations for Section 504 Students; PGCPS Section 504 Health/Medical Transportation Assessment; Section 504 Evaluation Checklist

App. Ex. 30 - Emails between Mr. Whattam and the Appellant, February 11 and 12, 2012; Emails between Mr. Whattam and the Appellant, February 13, 2012; *Loudermill* Invitation; Emails between the Appellant and Ms. Wray, February 9, 2012; Emails between Ms. Wray and Ms. Jordan, March 13,

2012; Letter from the Appellant to Mr. Whattam, undated (*Loudermill* Response); Verification of *Loudermill* discussion, February 16, 2012; *Loudermill* conference sign-in sheet, February 16, 2012; Email from the Appellant to Mr. Whattam, February 21, 2012, with attached *Loudermill* Response; PGCPS Section 504 Accessibility Plan for student A.C., November 30, 2011; Bladensburg School Instructional Team Agenda and attendance sheet, November 30, 2011; handwritten notes, February 16, 2012; Email from Bryan Chapman[4] to the Appellant, June 12, 2012;

App. Ex. 31 - Letter from Ms. Jordan to the Appellant, March 23, 2012, with handwritten notes

App. Ex. 32 - Contact information for L.M., mother of student A.C., with handwritten notes, March 1, 2012

App. Ex. 33 - Email from Ms. Jordan to Bladensburg Staff, November 12, 2011, with attached conference request form

App. Ex. 34 - Email from the Appellant to Ms. Caruth-Hunt, November 18, 2011

Testimony

The Appellant testified in her own behalf as concerns the *Loudermill, supra*, issue. No additional testimony was presented to me because the matter was otherwise argued on the record submitted to the hearing examiner.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Appellant was a tenured and certified guidance counselor for PGCPS.[5] The Appellant was initially employed with the PGCPS from 1970 to 1978. She resumed employment with PGCPS in 2003, as a school counselor.

2. The Appellant began working at Bladensburg in August 2010.

3. During school year 2011 to 2012, the Appellant's student caseload included ninth grade student A.C.

[4] Mr. Chapman's affiliation and position are not specified.
[5] This fact is not disputed. (*See* Local Board's Post-Hearing Memo. at 1.)

4. A.C. had a diagnosis of attention deficit hyperactivity disorder and was covered under Section 504 of the Rehabilitation Act of 1973 (Section 504), which is designed to ensure that disabled students receive a free, appropriate, education. A.C. had a Section 504 Accessibility Plan and Testing Accommodations (Section 504 Plan) pursuant to which he received services and accommodations; as of November 2011, A.C.'s Section 504 Plan was last reviewed on December 14, 2010.

5. On November 18, 2011, the principal of Bladensburg, Glynis Jordan (Principal Jordan), asked the Appellant to prepare a 504 Accessibility Plan for A.C., and the Appellant placed A.C. on the agenda for discussion at a November 30, 2011 School Instructional Team (SIT) meeting.

6. On November 30, 2011, the Appellant, five other school counselors, the school nurse, an ESOL[6] crisis coordinator, and a pupil personnel worker (PPW) attended the SIT meeting. A.C. was one of the students discussed at the SIT meeting.

7. No Section 504 Plan meeting was held for A.C. between November 18, 2011 and February 6, 2012.

8. After the November 30, 2011 SIT meeting, the Appellant prepared an updated Section 504 Plan for A.C.

9. On February 2, 2012, Principal Jordan requested that the Appellant provide her with a copy of AC's completed Section 504 Plan. The Appellant responded that she was still attempting to obtain a signature from A.C.'s parent.

10. On February 6, 2012, A.C.'s mother came to the Appellant's office and signed the Section 504 Plan and the Appellant provided it to the assistant principal of Bladensburg,

[6] ESOL is the acronym for English as a second language.

Bernadette Aisha Mahoney. Ms. Mahoney did not sign off on the Section 504 Plan, but provided it to Principal Jordan for review.

11. On Wednesday, February 8, 2012, the Appellant was sent a calendar invitation, via email, for meeting identified as "*Loudermill* w/PGCEA" (Meeting), to be held on Thursday, February 16, 2012 at the PGCPS administration building. The Meeting was described only as "Regarding 504 Plan."

12. By the morning of February 9, 2012, the Appellant, through her own research, had a basic understanding of the nature of a *Loudermill* meeting. Accordingly, she emailed Principal Jordan asking for a detailed explanation of the charges against her and the documents supporting those charges. Principal Jordan did not provide that information, but referred the Appellant to Mr. Whattam.

13. Subsequently, but still on February 9, 2012, the Appellant emailed Ms. Wray requesting detailed information about the charges against her and the supporting documents. Ms. Wray responded by informing the Appellant that she would be provided with the requested information at the Meeting and would be provided with an opportunity to make a written and oral response.

14. On the afternoon of Friday, February 10, 2012, the Appellant emailed Mr. Whattam seeking the identity of the student whose Section 504 plan was at issue and inquiring into the nature of the concerns with that plan.

15. On Saturday, February 11, 2012, the Appellant again emailed Mr. Whattam seeking the same information and requesting a postponement of the Meeting. The Appellant also noted that the Union representative assigned to her was a defendant in a pending lawsuit in which the Appellant was the plaintiff.

16. On Sunday, February 12, 2012, Mr. Whattam responded that the Meeting would concern "the legitimacy of a 504 plan [the Appellant] prepared dated 11/30/11 for student A.C." The email stated that the details of PGCPS's concerns would be shared at the Meeting, which would not be postponed.

17. On Monday, February 13, 2012, the Appellant emailed Mr. Whattam again, thanking him for the information regarding the Section 504 plan. She did not request any additional information at that time. The Appellant repeated her concerns about her Union representative and noted that she intended to bring legal counsel with her to the Meeting.

18. That same morning, Mr. Whattam informed the Appellant, by email, that she would need to address the matter of her Union representative with the Union and that she could bring an attorney to the Meeting, but the attorney would not be permitted to participate.

19. On February 16, 2012, the Appellant attended the Meeting. Principal Jordan, Ms. Wray, and Elizabeth Sessoms (also known as Elizabeth Faison) also attended the Meeting.

20. The Appellant was not provided with a union representative at the Meeting.

21. The Appellant's attorney, Belinda Lamptey, attended the Meeting with her. Ms. Lamptey was not a member of the Maryland bar. Although Ms. Lamptey was permitted to attend the Meeting, she was not permitted to act as the Appellant's legal representative during the Meeting.

22. At the Meeting, the Appellant learned for the first time that she was being accused of forging A.C.'s Section 504 Plan and failing to hold a Section 504 Plan meeting in connection with her preparation of A.C.'s Section 504 Plan. The Appellant also learned that Principal Jordan had documentation from the Appellant's coworkers stating that they did not attend a Section 504 Plan meeting for A.C.

23. The Appellant refused to provide a verbal response to the charges at the Meeting, but was permitted an opportunity to make a written response.

24. On February 21, 2012, the Appellant submitted a written response to the issues raised at the Meeting.

25. On March 21, 2012, William R. Hite, Ed.D., Superintendent of PGCPS, recommended to the Local Board that the Appellant be terminated from her position on the grounds of misconduct in office and willful neglect of duty as a result of claimed improprieties in connection with the Section 504 Plan for A.C. The Appellant was placed on administrative leave without pay pending action by the Local Board on the Superintendent's recommendation.

26. The Appellant requested a hearing before the Local Board.

27. On June 25, 2014 and July 1, 2014, an evidentiary hearing was held before the Hearing Examiner. The Appellant was represented by counsel at that hearing, she testified on her own behalf, and actively and fully participated in the hearing.

28. On September 28, 2014, the Hearing Examiner made a written recommendation that the Local Board approve the Appellant's termination for willful neglect of duty.

29. On July 15, 2015, the Local Board accepted the Hearing Examiner's recommendation that the Appellant be terminated for willful neglect of duty.

DISCUSSION

Loudermill Issue

The Appellant contends that her termination was improper because she did not receive adequate pre-termination procedural protections. The Appellant's argument is founded in the due process clause of the Fourteenth Amendment to the Constitution of the United States

(Fourteenth Amendment), which provides, in pertinent part: "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law[.]"[7] U.S. Const., Amend. XIV, § 1.

A public employee has a constitutionally protected property interest in continued employment if the employee is subject to discharge only for cause. *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538 (1985); *Linton v. Frederick County*, 964 F.2d 1436, 1438-39 (4th Cir. 1992). There is no dispute that the Appellant, as a tenured and certified guidance counselor for PGCPS, had a property interest in her continued employment. *See* Md. Code Ann., Educ. § 6-202. The question, then, becomes what process was due. *See Linton*, 964 F.2d at 1439.

In *Loudermill, supra*, the Supreme Court concluded that due process dictates that a public employee who has a property right in continued employment is entitled to pre-termination notice and an opportunity to be heard. *See* 470 U.S. at 542, 545-46. The Court made clear, however, that the pre-termination process that is due is limited. *Id.* at 545. "[T]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Id.* at 545 (internal quotation omitted). At a minimum, due process requires that an employee with a protected property interest in continued employment be provided with notice of the charges, the basis for those charges, and a pre-termination opportunity to respond to the charges. *Garraghty v. Jordan,* 830 F.2d 1295, 1299 (4th Cir.1987) (citing *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 546 (1985)).

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[7] Article 24 of the Maryland Declaration of Rights (Article 24) similarly provides:

> That no man ought to be . . . deprived of his life, liberty or property, but by the judgment of his peers or by the Law of the land.

Md. Code Ann., Const. (2003). The Court of Appeals of Maryland has interpreted Article 24 and the due process clause of the Fourteenth Amendment "to be *in pari materia* such that interpretations of the Due Process clause of the Fourteenth Amendment provided by the United States Supreme Court serve as persuasive authority for Article 24." *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 77-78 (2001). Neither party argued that Article 24 required application of any different or additional pre-termination procedures than those procedures required in accordance with the Fourteenth Amendment.

In advancing her argument that the pre-termination procedures were inadequate and failed to comport with the requirements of due process, the Appellant acknowledges that she attended a pre-termination meeting on February 16, 2012; however, she complains that in connection with that Meeting, she:

- did not receive a timely, detailed written explanation of the basis for the proposed termination of her employment;
- was not provided with advance copies of the documents to be used at the hearing;
- was not permitted to have her attorney provide legal representation at the Meeting

(*See* Appellant's Mot. to Supplement the Record at 6-8.)

The Supreme Court's decision in *Loudermill, supra*, has been fleshed out in subsequent decisions from the federal courts. The Fourth Circuit's decision in *Linton*, 964 F.2d 1436, provides an instructive analysis of the contours of the procedural requirements laid out in *Loudermill*. There, the Fourth Circuit affirmed the entry of summary judgment against a Frederick County employee who contended he was denied due process because he was given inadequate pre-termination notice of the charges against him. In that case, the very day that the employee returned from vacation, he was met by his supervisors, who orally explained the complaint against him and provided him with a memorandum that set forth the complaints, some of which were described specifically and some of which were described only generally. *See* 964 F.2d at 1437. The employee did not have representation, whether legal or union, at the meeting. During that meeting, the employee was given the opportunity to respond to the complaint. *Id.* His employment was terminated the following day when he opted not to resign voluntarily. *Id.* at 1438.

In concluding that the employee received adequate pre-termination notice of the cause for his dismissal, the court observed that due process required that the employee be "given 'oral or

written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.'" *Id.* at 1439 (quoting *Loudermill*, 470 U.S. at 546). The court observed that the core charges against the employee were sufficiently detailed to enable the employee to focus on the operative conduct relied upon by his employer. *Linton*, 964 F.2d at 1439-41. The court noted that there was no evidence that the employee was confused about any of the charges during the hearing and that the employee acknowledged he was involved in the work that was the subject of the complaint. *Id.* at 1440 (citing *Gniotek v. City of Philadelphia*, 808 F.2d 241, 244-45 (1986)). Accordingly, the short period of time afforded to the employee to formulate his response was sufficient to satisfy due process.

The purpose of the notice requirement is to ensure that the employee has "the opportunity to determine what facts, if any, within [the employee's] knowledge might be presented in mitigation of or in denial of the charges." *Gniotek*, 808 F.2d at 244; *see also Linton*, 964 F.2d at 1440 (explaining that adequacy of notice depends upon whether it provided the employee with an opportunity to deny involvement in the conduct charged). Here, the totality of the circumstances demonstrates that the notice provided to the Appellant satisfied the requirements of due process.

On its own, the February 8, 2012 Meeting invitation was vague and non-specific, stating only that it was "Regarding 504 Plan." Although the Meeting invitation came just two days after the Appellant provided A.C.'s Section 504 Plan to the assistant principal at Bladensburg,[8] A.C. was not the only student on the Appellant's caseload who had a Section 504 Plan. Indeed, the agenda for the November 30, 2011 SIT meeting indicates that the Appellant was working on Section 504 Plans for at least two other students in the pertinent timeframe. Further, there was no indication as to the nature of the concern with the unidentified Section 504 Plan. The general

[8] (*See* July 1, 2014 Hearing Transcript at 75-76.)

statement in the Meeting invitation was inadequate information to permit the Appellant to make an informed response to the charges against her. *See Linton*, 964 F.2d at 1440-41.

Additional notice was provided to the Appellant, however, including on February 12, 2012, when Mr. Whattam informed the Appellant that the Meeting would concern "the legitimacy" of the Section 504 Plan she prepared for A.C. on November 30, 2011. In her follow up email with Mr. Whattam, the Appellant did not request any additional information about the nature of the charges. Further, during the Meeting, the specific charges (forgery, failing to call a Section 504 Plan meeting) were delineated for the Appellant. The Appellant declined to provide a verbal response to the charges during the Meeting and was permitted to submit her written response five days later—well after the Meeting, where she learned the details of the charges against her. Thus, under the totality of these circumstances, I find that the Appellant was provided sufficient notice of the specific charges against her to enable her to prepare her response and to marshal any facts she wished to present in denial or mitigation of the charges. *Linton*, 964 F.2d at 1440; *Gniotek*, 808 F.2d at 244.

Employing this same analysis, which considers the totality of the circumstances, the Local Board's failure to provide the Appellant with advance copies of the documents it relied upon to support its charges does not violate due process. By the time the Appellant made her response, five days after the meeting, she was aware of the documents being relied upon to support the charges against her. According to her own testimony at the December 14, 2015 hearing, this material was discussed at the Meeting. The Appellant testified that she had copies of some of the documents in her desk file for A.C. Moreover, in her written response, the Appellant did not assert that she was unable to adequately respond to the charges against her because she lacked copies of the documents. Thus, I find that she had sufficient notice of the

documents used to support the charges against her in order to permit her to prepare a response to the charges. *Linton*, 964 F.2d at 1440; *Gniotek*, 808 F.2d at 244.

The Appellant further argued that the Local Board failed to provide her with due process in advance of her termination because her attorney was not permitted to participate in the Meeting. This argument fails for a practical reason. Ms. Lamptey, the counsel chosen by the Appellant, was not admitted to the Bar of the Court of Appeals of Maryland. (*See* App. Ex. 30 at 13.) Thus, she could not have acted as the Appellant's attorney in this proceeding. Md. Code Ann., Bus. Occ. & Prof. § 10-601(a) (2010) ("except as otherwise provided by law, a person may not practice, attempt to practice, or offer to practice law in the State unless admitted to the Bar"). Thus, regardless of whether the Appellant had a due process right to be represented by counsel at the Meeting, the Appellant sustained no prejudice from the Local Board's decision that her attorney could not participate in the hearing. *See also Buschi v. Kirven*, 775 F.2d 1240, 1255-56 (4th Cir. 1985) (supervisor did not violate due process when he refused to allow employees' attorneys to attend pre-termination hearing).

At the December 14, 2015 hearing, the Appellant also argued, apparently for the first time, that she was never informed of the potential consequences of the charges against her. That is, she was not informed that her employment might be terminated based upon the charges. The Appellant acknowledged in her testimony that she was aware, due to her research on the internet, of the purpose of a *Loudermill* hearing. Thus, even if the Local Board never explicitly informed her that she might be discharged as a result of the charges against her, the Appellant was aware that significant discipline was being contemplated by virtue of the fact that a *Loudermill* hearing was being held. Indeed, in her February 21, 2012 written response to the charges raised at the Meeting, the Appellant acknowledged the "disciplinary" nature of the proceeding and that there

was a range of discipline levels that could be imposed. (App. Ex. 30 at 13, 14.) Considering the totality of the circumstances, I do not find a violation of due process occurred.

In considering the Appellant's due process arguments, it should be noted that the Appellant received significant post-termination process. She was provided with a two-day evidentiary hearing before the Hearing Examiner, where she was represented by counsel and had the ability to cross-examine and call witnesses. She then filed the instant appeal and was permitted to supplement the record before the Hearing Examiner with additional testimony on the *Loudermill* issue and to make additional argument on the merits of her appeal. The availability of post-termination procedures is a factor in considering the amount of process due in advance of the termination. *Garraghty v. Jordan*, 830 F.2d 1295, 1300 (4th Cir. 1987) ("'[T]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.'") (quoting *Loudermill*, 470 U.S. at 545). The extensive post-termination procedures provided to the Appellant further obviate her claim that she was denied due process.

Willful Neglect of Duty[9]

Pursuant to section 6-202 of the Education Article (Section 6-202), "[o]n the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, other professional assistant" for reasons including "[w]illful neglect of duty." Md. Code Ann., Educ. § 6-202(a)(1)(v) (Supp. 2012). Section 6-202 of the Education Article does not define "willful neglect of duty." Willful neglect of duty in regard to the Education Article has been defined by the MSDE as "a willful failure to discharge duties which are regarded as general teaching." *See Crawford v. Bd. of Educ. of Charles Cty.*, 1 Op.

[9] The March 21, 2012 letter from Dr. Hite also cited misconduct in office as a basis for her termination. The Hearing Examiner based his recommendation solely on willful neglect of duty and the Local Board thereafter accepted Dr. Hite's recommendation for termination of the Appellant's employment on the sole ground of willful neglect of duty. *See* Order dated July 15, 2015 at 4.

MSBE 503 (1976); *Steward v. Balt. Cty. Bd. of Educ.*, 5 Op. MSBE 15 (2005); *see also Moore v. Balt. City Bd. of Sch. Comm'rs*, 4 Op. MSBE 03 (2003) (finding Moore's failure to follow the assistance plan willful neglect of duty).

Section 6-202 further states that the individual "may appeal from the decision of the county board to the State Board." Md. Code Ann., Educ. § 6-202(a)(4). Under COMAR 13A.01.05.07A, the State Board "shall transfer an appeal to the [OAH] for review by an administrative law judge" under circumstances including an "appeal of a certificated employee suspension or dismissal" pursuant to section 6-202 of the Education Article.

Under COMAR 13A.01.05.05, the standard of review for dismissal actions involving certificated employees is *de novo*: "The State Board shall exercise its independent judgment on the record before it in determining whether to sustain the suspension or dismissal of a certificated employee." Thus, I am to make a new decision, that is, a *de novo* determination based upon the record created before the matter came to me. I do not conduct an entirely *de novo* hearing, starting everything anew. Although an entirely *de novo* hearing is not contemplated by the regulation, COMAR 13A.01.05.04C provides that an appellant may present additional evidence if it is shown that the evidence is material and that there were good reasons for the failure to offer the evidence in the proceeding before the Local Board. No new evidence was admitted as to the finding of willful neglect of duty by the Appellant.

The Local Board has the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05F. To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so," when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

In his March 21, 2012 letter to the Appellant (Termination Letter), Dr. Hite advanced two factual bases for his recommendation to the Local Board: (1) that the Appellant willfully failed to schedule the required Section 504 Plan meeting for A.C., and (2) that the Appellant intentionally falsified A.C.'s Section 504 Plan to make it appear that a Section 504 Plan meeting had been held. (Termination Letter at 2.) Dr. Hite concluded that these actions were evidence of willful neglect of duty and misconduct in office and were of such severity to warrant the Appellant's termination.

I do not find that the evidence supports Dr. Hite's conclusion that the Appellant intentionally falsified A.C.'s Section 504 Plan to make it appear that a Section 504 Plan meeting had occurred. The evidence relied upon to support the allegation of deliberate falsification largely consisted of the Section 504 Plan itself, supported with documentation from staff and administrators stating that they had not attended a "Section 504 meeting" for A.C. on November 30, 2011. The preponderance of the evidence does not establish that the Appellant deliberately attempted to falsify A.C.'s Section 504 Plan to make it appear as though a Section 504 meeting, as opposed to a SIT meeting, had been held for A.C.

In this regard, the evidence demonstrated that the Appellant made no attempt to hide that A.C.'s Section 504 Plan was revised after it was discussed at the SIT meeting on November 30, 2011. Although the Section 504 Plan prepared by the Appellant does not specifically identify the nature of the meeting at which it was developed, from the outset, the Appellant was open in her actions. In this regard, on November 18, 2011, upon being asked to prepare the Section 504 Plan for A.C., the Appellant emailed another Bladensburg counselor and requested that she add A.C. to the agenda for the next "SIT meeting." (App. Ex. 34.)

The Local Board placed significant reliance on the fact that the list of meeting attendees provided with A.C.'s Section 504 Plan was written entirely by the Appellant and did not include

the people necessary for a Section 504 meeting—including a parent, administrator, the student's classroom teacher and guidance counselor, and, where appropriate, the student himself (Section 504 Team). These facts, on their own, do not indicate a deliberate attempt by Appellant to make it appear as though a Section 504 Plan meeting had been held, instead of a SIT meeting. To the contrary, the Appellant made no attempt to disguise that the list of attendees was written entirely by her: the handwriting used to write each person's name was clearly identical and matched the handwriting on the remainder of the form; the list of attendees was written using each person's title and last name (*i.e.*, "Ms. Caruth-Hunt"), and not as if the individual had written their own name. (*See* CEO Ex. 3.) Moreover, the Local Board argued strenuously that the SIT meeting could not have been a proper Section 504 Plan meeting because A.C.'s parent was not present, nor was A.C.'s classroom teacher or an administrator. The Appellant made no attempt to disguise that those individuals were not present at the meeting where A.C.'s Section 504 Plan was discussed. The Section 504 Plan she prepared for A.C. expressly identified the position held by each of the attendees. Specifically, it identifies six counselors, the school nurse, an ESOL crisis counselor, and a PPW. Thus, even if Principal Jordan was not independently aware that none of the named individuals was A.C.'s parent, classroom teacher, or administrator, it would have been immediately apparent from the Section 504 Plan itself that the meeting was not attended by those individuals. (*See* June 25, 2014 Hearing Transcript at 47-48 (noting that it was apparent that the attendees did not include various members of the Section 504 Team).)

Importantly, the Appellant testified that the informal practice at Bladensburg permitted Section 504 Plan annual reviews to be made based upon discussions during SIT meetings. (July 1, 2014 Hearing Transcript at 73, 81, 149-52.) That is, she would have no reason to deliberately misrepresent the November 30, 2011 meeting as a Section 504 Plan meeting when she believed that Bladensburg would turn a blind eye to the deficiencies and permit a Section 504 Plan to be

revised based on discussions at a SIT meeting. In light of the totality of the evidence, I do not find that the Appellant deliberately, *i.e.*, willfully, falsified A.C.'s Section 504 Plan.

Whether the Appellant willfully failed to schedule a Section 504 meeting in connection with her revision of A.C.'s Section 504 Plan, however, is a separate question. Federal law governs the development and implementation of Section 504 Plans and PGCPS has specific procedures to be followed in developing a Section 504 Plan. PGCPS requires annual review of each student's Section 504 Plan. (*See* PGCPS Administrative Procedure No. 5146, at 4 (March 1, 2006); PGCPS Bulletin, at 2 (June 6, 2011).) The Local Board took the position that the annual review required a meeting of all of the individuals who comprised a student's Section 504 team—"the school administrator or designee, parents, the student's teacher, guidance counselor, and the student, as appropriate." (PGCPS Administrative Procedure No. 5146, at 3.) The Appellant acknowledged that she was familiar with PGCPS Administrative Procedure No. 5146,[10] but steadfastly contended that the review of a Section 504 Plan did not require a meeting of the entire Section 504 Team.

There are two documents that are of particular relevance here. First, a February 22, 2011 Memorandum from Karyn T. Lynch, Chief of Student Services, to all principals and all professional school counselors (which would include the Appellant) made it patent that all of the members of the Section 504 Team were required to participate in an annual Section 504 Plan review meeting. That Memorandum stated:

> This memorandum serves as a reminder for all Professional School Counselors to closely monitor the implementation of Section 504 plans for every student receiving Section 504 services. Section 504 plans, at a minimum must be reviewed annually. All Section 504 team members must be involved in the annual review meeting and parents, in accordance with the law, must be strongly encouraged to attend. If a parent cannot attend, after reasonable attempts have been made, the meeting should proceed. Professional School Counselors must speak with each teacher, school nurse and any staff member involved with the

[10] (*See* July 1, 2014 Hearing Transcript at 96.)

> student, to assess the progress of each student receiving Section 504 services. It is imperative that all staff involved with the student are informed of the Section 504 plan and are currently implementing services. . . .

(PGCPS Memorandum, February 22, 2011 (emphasis added).) The Appellant testified that she received the February 22, 2011 Memorandum. (July 1, 2014 Hearing Transcript at 111-12.)

Second, a June 6, 2011 Bulletin from Dr. Hite reiterated that all Section 504 plans must be updated annually. (PGCPS Bulletin at 2 (June 6, 2011).) He also directed that a student's teachers and other relevant staff must be part of the meeting to review a Section 504 plan. (*Id.* at 1.) The Appellant's testimony made clear that she had received Dr. Hite's Bulletin, which she testified about in detail. (*See* July 1, 2014 Hearing Transcript at 126-28.)

The Local Board also presented testimony from Elizabeth Faison, PGCPS Instructional Supervisor of School Counselors, who was permitted to testify as an expert on best practices in the development of Section 504 plans. (June 25, 2014 Hearing Transcript at 22-23.) Ms. Faison testified that PGCPS Administrative Procedure No. 5146 prescribed the procedures that must be followed for all Section 504 plans. (*Id.* at 28-29.) She testified that a Section 504 annual review meeting requires the participation of the entire Section 504 Team, and she explained why each team member was crucial to the review process. (*Id.* at 31-39, 48-49.) Ms. Faison observed that it is important for the classroom teacher to be present because the teacher is responsible for implementing the Section 504 Plan and will be able to offer advice on what can be expected from the student, what strategies are working for the student, and what strategies are feasible to implement in the classroom. (*Id.* at 36-37.) The parent is a vital part of the Section 504 Team because the parent is a partner in the process and must know what is occurring at school and also because the parent is an expert on the student and the student's history, behavior, and challenges. (*Id.* at 37-39.) She also observed that at the high school level, the student's participation is appropriate because the student can voice his own issues and challenges. (*Id.* at 48-50.) Ms.

Faison concluded that a SIT meeting, which does not include these individuals, is not an appropriate Section 504 Team meeting and that a proper Section 504 Plan cannot be developed at a SIT meeting. (*Id.* at 50-53.)

Ms. Faison further testified that the student's school counselor is the person responsible for organizing the Section 504 Team meeting. (*Id.* at 54-55.) The school counselor is responsible for inviting the attendees and leading the meeting. (*Id.*) Additionally, the counselor is to review the student's file prior to the Section 504 Team meeting. (*Id.*)

The Appellant, in her testimony, initially acknowledged that a Section 504 Plan should have been prepared annually, within a twelve-month period, or the PGCPS would be out of compliance with Section 504. (July 1, 2014 Hearing Transcript at 77-78.) Yet she also testified that she believed a Section 504 Team meeting did not need to be held annually. (*Id.* at 127-28.) She further asserted that the student's teacher and parents do not need to be part of a meeting to review a Section 504 Plan. (*Id.* at 128-32.) Her testimony was confused and simply not credible in light of her twenty-five years of experience as a school counselor,[11] her asserted familiarity with the procedures for developing a Section 504 plan,[12] Ms. Faison's testimony concerning the proper Section 504 plan procedures, the plain and clear language used by PGCPS in specifying that the annual review meeting for a Section 504 plan must include the Section 504 Team,[13] and the Appellant's acknowledged receipt of the relevant procedural documents.[14]

I find that the plain language of the February 22, 2011 Memorandum, specifying that "[a]ll Section 504 team members must be involved in the annual review meeting,"[15] the Appellant's acknowledgement that she received this document, and the Appellant's decision, notwithstanding that directive, to schedule a SIT meeting to review A.C.'s Section 504 Plan

[11] (July 1, 2014 Hearing Transcript at 142.)
[12] (July 1, 2014 Hearing Transcript at 142.)
[13] (PGCPS Bulletin at 2 (June 6, 2011); PGCPS Memorandum, February 22, 2011.)
[14] (July 1, 2014 Hearing Transcript at 111-12, 126-28.)
[15] (PGCPS Memorandum, February 22, 2011.)

without A.C.'s classroom teachers, without A.C., without A.C.'s parent, and without an administrator, indicates a willful failure to schedule the required Section 504 Plan meeting for A.C. The Appellant's willful failure to schedule the appropriate meeting had the potentiality for significant harm to A.C. and to PGCPS. As to the potential for harm to A.C., the student was already identified as needing special services to ensure that he obtained a free, appropriate, public education. The failure to adequately monitor, manage, and revise those services, by consulting with the individuals (his classroom teachers and parent, or A.C. himself) who had the greatest knowledge of A.C., his needs, and challenges was detrimental to this at-risk student. This is particularly true in light of the Appellant's limited familiarity with A.C., who she contended was not even a part of her caseload until November 18, 2011. Moreover, the Appellant herself recognized that the failure to appropriately revise A.C.'s Section 504 Plan would result in PGCPS being out of compliance with its regulations for revising Section 504 plans and, potentially, with federal law. (*See* July 1, 2014 Hearing Transcript at 77-78.)

Based upon my *de novo* review, I find that the record supports a finding that the Appellant willfully failed to schedule the required Section 504 Plan meeting for A.C. and that the Board was justified in terminating the Appellant as a result. I therefore conclude that the decision of the Board to terminate the Appellant should be affirmed.

PROPOSED CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Appellant was provided with sufficient pre-termination due process. U.S. Const., Amend. XIV, § 1; Md. Code Ann., State Gov't § 10-207(b)(2) (2014); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Linton v. Frederick Cty.*, 964 F.2d 1436, 1438-39 (4th Cir. 1992). Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law,

that the Appellant, a counselor employed by the Board of Education for Prince George's County, was properly dismissed for willful neglect of duty. Md. Educ. Code Ann. §6-202(a)(1)(v).

PROPOSED ORDER

I **PROPOSE** that the decision of the Board of Education of Prince George's County terminating the Appellant for willful neglect of duty be **UPHELD**.

March 14, 2016
Date Decision Mailed

Emily Daneker
Administrative Law Judge

Ed/da
#161197

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this Proposed Decision has the right to file written exceptions within 15 days of receipt of the decision; parties may file written responses to the exceptions within 15 days of receipt of the exceptions. Both the exceptions and the responses shall be filed with the Maryland State Department of Education, c/o Sheila Cox, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. COMAR 13A.01.05.07F. The Office of Administrative Hearings is not a party to any review process.

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