

YVETTE FINLAY-GAINES

Appellant

v.

MONTGOMERY COUNTY  
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 17-40

## OPINION

### INTRODUCTION

Appellant, a special education teacher, challenges the decision of the Montgomery County Board of Education (“local board”) to terminate her from her teaching position for incompetence. We referred this case to the Office of Administrative Hearings (OAH) as required by COMAR 13A.01.05.07A(2).

On January 11, 2017, the Administrative Law Judge (ALJ) issued a Proposed Decision recommending that the State Board uphold the local board’s termination decision. Although the ALJ found in favor of the local board, the local board filed exceptions to two specific issues addressed in the Proposed Decision. The Appellant also filed exceptions. Each party has responded to the other’s exceptions. Per agreement of the parties, oral argument is being held before the State Board on October 24, 2017.

### FACTUAL BACKGROUND

#### **ALJ’s Proposed Decision**

Appellant was a special education teacher certified by the Maryland State Department of Education (“MSDE”). She held the special education certification for elementary/middle school for grades 1 through 8 and secondary school/adult for grades 6 through 12, as well as an Administrator I certificate. She argued in her appeal that her termination was improper because it was based on an evaluation of her performance as a classroom teacher for subjects (English and social studies) that she maintains she was not qualified to teach under the Maryland certification regulatory scheme and pursuant to the federal No Child Left Behind (NCLB) “highly qualified” teacher requirement. We transferred the matter to an ALJ for review and recommendation.

The ALJ concluded that the local board properly terminated the Appellant for incompetency and recommended that the State Board affirm the decision. In doing so, however, the ALJ found that the evaluation of the Appellant’s performance under Evaluation Standard II (Teachers Know the Subjects They Teach and How to Teach Those Subjects to Students) of the Professional Growth System (“PGS”)<sup>1</sup> was not fair because it was based on Appellant’s

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<sup>1</sup> The PGS contains the following 6 Evaluation Standards: Standard I – Teachers are committed to students and their learning; Standard II – Teachers know the subjects they teach and how to teach those subjects to students; Standard

classroom performance in core subjects that she was not qualified to teach.<sup>2</sup> The ALJ found Appellant unqualified to teach English and social studies because she lacked subject matter certification in English and social studies and she did not hold the “highly qualified” teacher designation under the NCLB.<sup>3</sup> (ALJ Proposed Decision at 50-53). The ALJ concluded, nevertheless, that the local board’s termination decision was proper based on the evaluation of Appellant’s performance under Evaluation Standards I, III, IV and VI, which addressed her teaching practices rather than those related to the content of the subject being taught. (*Id.* at 54-58).

The ALJ wrote a comprehensive and well-developed recitation of the facts in this case. The full factual background is set forth in the ALJ’s Proposed Decision, Findings of Fact (pp.4-33). We adopt the Findings of Fact in their entirety.

### 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). In addition, the State Board exercises its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations. COMAR 13A.01.05.05E.

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.

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III – Teachers are responsible for establishing and managing student learning in a positive learning environment; Standard IV – Teachers continually assess student progress, analyze the results, and adapt instruction to improve student achievement; Standard V – Teachers are committed to continuous improvement and professional development; and Standard VI – Teachers exhibit a high degree of professionalism.

<sup>2</sup>The ALJ also found several of the comments under some of the other evaluation standards were unfair because they were related to knowledge of the subject area and how to teach it, and thus discounted those specific comments. (*Id.* at p.55, n. 38).

<sup>3</sup> The NCLB specified:

Not later than the end of the 2005-2006 school year, each State that receives funds under subpart A of this part [Title I], and each LEA in that State, must ensure that all public elementary and secondary school teachers in the State who teach core academic subjects . . . are highly qualified. . . .

To be considered “highly qualified” the teacher had to demonstrate competence in all core academic subjects taught by the teacher. For teachers who were not new to the profession, this could be shown through a single, high objective uniform State standard of evaluation (HOUSSE). 34 CFR 300.18. The “highly qualified” designation no longer exists.

## EXCEPTIONS

### **Appellant's Performance Problems**

As mentioned above, the ALJ found substantial evidence in the record to support Appellant's termination while discounting those portions of the Appellant's 2013-2014 Summative Report and Evaluation that related to the subject matter being taught (English and social studies). Even if we were to assume that the Appellant lacked any content knowledge in English or social studies as she maintains and exclude the same portions of the Summative Report and Evaluation as the ALJ, we agree that there is sufficient evidence to support Appellant's termination for incompetency.

First, we point out that the local board accepted the Superintendent's recommendation to terminate the Appellant for incompetency at the end of the 2014-2015 school year based on her poor teaching performance over the prior three years. We also point out that the 2014-2015 school year was the only year that the Appellant taught the English and social studies classes at John L. Gildner Regional Institute for Children and Adolescents (RICA).<sup>4</sup> Prior to that, the Appellant was a transition support teacher at Northwest High School (Northwest) teaching special education students work and life skills, and evaluating the students' learning and career styles for development of their post-secondary options. (T. 592). During the 2012-2013 school year at Northwest, she taught two sections of a College/Career Seminar in the fall and one section of College/Career Research and Development in the spring. At the end of the 2013-2014 school year at Northwest, she co-taught four special education resource room classes and helped in the resource room.

Performance issues were not new to the Appellant. Starting as early as 2009, concerns had surfaced regarding her inability to properly complete paperwork and Individualized Education Plans (IEPs). Despite receiving support, coaching and assistance on various aspects of her job, at the end of the 2011-2012 school year Appellant was placed on a Continuous Improvement Plan that set forth standards for improvement.

During the 2012-2013 school year, when she taught the college/career classes at Northwest High School, the Appellant's performance did not improve. Comments from her February 1, 2013 classroom observation indicated that she inconsistently checked for student understanding during the lesson (Standard II); that she did not properly pace the lesson; that the lesson activity did not correspond to the lesson's objective; that she did not allow time to review the lesson and topic; and that she did not give sufficient time to complete the summarizing activity (Standard III). Appellant received a Below Standards rating on her March 21, 2013 Evaluation Report.

At the end of the 2012-2013 school year, Appellant was placed into the Peer Assistance and Review (PAR) program for the following performance problems: (1) there was little evidence that she regularly communicated with all students and parents in order to meet IEP transition goals; (2) she struggled to establish an organizational system for collecting and analyzing student information and failed to prioritize goals and objectives as a prerequisite to providing transition support; (3) she failed to adequately frame instruction to set up the "Big Picture" by providing a purpose for learning; (4) students were writing and not paying attention to the Appellant when she tried summarizing at the end of the lesson; (5) she failed to connect

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<sup>4</sup> RICA is a special education school that offers day and residential programs for special education students.

tasks to the lesson; (6) she failed to elicit student discussion on the lesson objective; and (7) she failed to extend student thinking by asking higher level questions.

At the beginning of the 2013-2014 school year, Appellant was still teaching the college/career classes at Northwest. She then went on sick leave for a good portion of the school year. When she returned, she co-taught the special education resource room classes at Northwest. Despite her lengthy absence, there was opportunity at the beginning and the end of the year to conduct classroom observations. The Appellant's Final Summative Report dated April 29, 2014, reflected serious deficiencies in her performance. As a result, the principal of the school and the consulting teacher from the PAR program both recommended dismissing the Appellant from her position. Yet after review and discussion with the PAR panel, the Superintendent renewed the teaching contract and placed the Appellant on a second PAR year because she had been out on sick leave for most of the year.

Appellant's teaching difficulties continued during the 2014-2015 school year, despite receiving support and assistance. She was assigned to teach English and social studies to special education students at RICA. She was not certified in either subject, but many of her teaching deficiencies related to generic practices that were not dependent upon the content of the subject being taught. For example, Appellant had mixed success in addressing classroom disruptions and off-task behaviors, and missed opportunities for explaining her expectations. Lesson pacing was also a problem, which left students with insufficient time for completing tasks, independent practice or a lesson summarizer. The Appellant inconsistently provided feedback on class grades. She did not provide students with progress reports, notify them of missing assignments, give them opportunity for reassessment, or provide feedback on activities or assignments. She also was inconsistent in communicating criteria for success by failing to provide writing rubrics, guidelines or expectations for student work, or an explanation of how assignments would be graded. (4/29/15 Final Summative Report). She also demonstrated a lack of respect and professional courtesy to some members of the school community. She was disrespectful, argumentative and defensive and did not accept feedback in a respectful and thoughtful manner. (5/18/15 Final Evaluation Report).

Based on the record evidence, we agree with the ALJ that even if we were to discount those portions of the Appellant's 2014-2015 Final Summative Report and Final Evaluation Report that specifically relate to content area knowledge, there is sufficient evidence of the Appellant's performance deficiencies to support her termination. (*See* Proposed Decision at 53, 55 n.38). As stated by the ALJ:

After so many years of teaching, many of these tasks should have been rote for the Appellant. Furthermore, many of the performance issues began before she was assigned to teach English and Social Studies, and simply continued through that transition, and/or continued throughout the 2014-2015 school year (e.g., not addressing disruptive and off-task behaviors; not pacing her instruction; not providing feedback, explanations and instruction; and engaging in unprofessional behavior). It is perplexing and unfortunate that after so many years of teaching, the Appellant's performance was sub-par, but the evidence was clear that it was.

(*Id.* at 57).

## **Local Board's Exceptions**

### *Special Education Certification*

The local board maintains that the ALJ failed to understand the Appellant's State certification status, causing her to conclude erroneously that Appellant's evaluation was unfair because she was not certified in English and social studies.

COMAR 13A.12.02.02A requires Maryland public school teachers to hold a professional certificate in the teacher's area of major assignment. The Appellant's area of major assignment was special education. She held the generic special education certification under COMAR 13A.12.02.20 in (1) elementary/middle (grade 1 through grade 8) and (2) secondary/adult (grade 6 through grade 12). Such certification allows an individual to teach special education children in grades 1 through 12 in various subjects, including English and social studies.

The ALJ, however, interpreted the State regulatory scheme for certification to require the Appellant to hold not only special education certification, but also content area certification in English and social studies. Such an interpretation, however, fails to give controlling weight to the applicable certification provision, which is COMAR 13A.12.02.02A, the special education certification regulation.

In the context of the State certification scheme, it was appropriate for the school system to assign the Appellant to teach the special education classes in English and social studies. We recognize, however, that being certified in special education does not necessarily denote specific content area expertise. The ALJ reasoned that, when the school system imposed an evaluation requirement on the Appellant that she "know" the subjects she was assigned to teach, it was not necessarily being fair to the Appellant. While there is some logic behind that reasoning, under the current certification scheme, special education teachers are expected to be ready and able to teach subjects such as English and history to their students, similar to the expectation for teachers certified in elementary education.

### *No Child Left Behind Act "Highly Qualified" Teacher Designation*

The ALJ also found that the evaluation of the Appellant under Standard II (Teachers Know the Subjects They Teach and How to Teach Those Subjects to Students) was not fair because it was based, in part, on an evaluation of the Appellant's performance as a classroom teacher for core subjects (English and social studies) that she was not "highly qualified" to teach under NCLB.<sup>5</sup> Nevertheless, the ALJ concluded that Appellant had sufficient teaching deficiencies unrelated to Standard II and the content of the coursework to support the termination.

The local board argues that the ALJ should not have considered the fairness of Appellant's evaluation in the context of a "highly qualified" status because it was a requirement

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<sup>5</sup> With regard to teacher certification, the NCLB specified:

Not later than the end of the 2005-2006 school year, each State that receives funds under subpart A of this part [Title I], and each LEA in that State, must ensure that all public elementary and secondary school teachers in the State who teach core academic subjects . . . are highly qualified. . . .

separate and apart from the State certification requirements and teachers were not precluded from teaching classes based on the fact that they lacked the NCLB “highly qualified” teacher designation.

Based on our review of the record in this case, we find that there was no need for the ALJ to address whether or not the Appellant lacked the NCLB “highly qualified” teacher designation or how the lack of designation impacted the evaluation. Even if we assume that the Appellant lacked any content knowledge in English and social studies as she maintains, there is more than enough evidence in the record to support her termination for incompetency as the ALJ found.

### **Appellant’s Exceptions**

The record does not support the Appellant’s claim that the school system failed to provide her sufficient support to help her overcome her teaching deficiencies. To the contrary, it reveals that the Appellant was provided with various assistance and support to help improve her performance over several years, and that a good deal of that support was aimed at addressing best teaching practices and her generic performance problems.

We also disagree with the Appellant’s assertion that the entire evaluation process must be considered unfair given that the ALJ found portions of the evaluation to be unfair. To accept this position would be to ignore the analysis that many of the Appellant’s teaching deficiencies predated the 2014-2015 school year and that there were sufficient teaching deficiencies during the 2014-2015 school year that were not dependent upon the content of the subject matter being taught.

### **CONCLUSION**

We find that there is substantial evidence in the record to sustain the Appellant’s termination without consideration of those aspects of the 2014-2015 evaluation process that were related to content area knowledge of English and social studies. Thus, we find no need to adopt those portions of the Discussion section of the ALJ’s Proposed Decision that address certification issues and the “highly qualified” teacher designation under NCLB and their impact on the Appellant’s evaluation and ultimate termination. We adopt all other aspects of the ALJ’s Proposed Decision and affirm the local board’s termination of the Appellant based on incompetency.

Signatures on File:

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Andrew R. Smarick  
President

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Chester E. Finn, Jr.  
Vice-President

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Michele Jenkins Guyton

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Justin Hartings

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Stephanie R. Iszard

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Rose Maria Li

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Michael Phillips

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David Steiner

Absent:  
Irene M. Zoppi Rodriguez

October 24, 2017

**YVETTE FINLAY-GAINES**

**v.**

**MONTGOMERY COUNTY BOARD  
OF EDUCATION**

**\* BEFORE EILEEN C. SWEENEY,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: MSDE-BE-01-16-18505**

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**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSION OF LAW  
PROPOSED ORDER

**STATEMENT OF THE CASE**

On July 17, 2015, the Montgomery County interim superintendent of schools recommended that the Appellant be terminated for incompetence, pursuant to section 6-202(a)(1)(iv) of the Education Article of the Maryland Annotated Code. At the Appellant's request, a hearing was held before Gregory A. Szoka, Esquire, Hearing Examiner, on October 23, 2015, November 5, 2015, and January 29, 2016.<sup>1</sup> On March 17, 2016, the Hearing Examiner issued a Decision recommending that the interim superintendent's recommendation for dismissal be adopted by the Montgomery County Board of Education (County Board). Pursuant to the Appellant's request, oral argument was heard by the County Board on April 20, 2016. On May 10, 2016, the County Board adopted and affirmed the Hearing Examiner's findings and recommendation and dismissed the Appellant from her position in Montgomery County Public Schools (MCPS). Md. Code Ann., Educ. § 6-203 (2014). The Appellant filed an appeal on June 9, 2016, which was transmitted to the Office of Administrative Hearings (OAH) on June 15,

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<sup>1</sup> Counsel for both parties made oral arguments before the Hearing Examiner on February 12, 2016.

2016. Md. Code Ann., Educ. § 6-202(a)(4) (Supp. 2016.) On July 11, 2016, the County Board filed a Reply to Appeal (Bd. Reply to Appeal).

I held a telephone Prehearing Conference on August 30, 2016 and issued a Prehearing Conference Report and Order on August 31, 2016. On September 29, 2016, I granted the Appellant's Request to Present Additional Material Testimony.

I conducted a hearing on October 14, 2016 at MCPS, Carver Educational Services Center, Rockville, Maryland. Judith S. Bresler, Esquire, represented the County Board. Willie J. Mahone, Esquire, represented the Appellant, who was present.<sup>2</sup>

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the Maryland State Board of Education (MSBE or State Board), and the OAH's Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 13A.01.05; COMAR 28.02.01.

### **ISSUES**

- 1) Did the County Board improperly terminate the Appellant for incompetency (a) based on an evaluation of her performance as a classroom teacher for subjects in which she did not have subject matter certification and/or (b) based on an evaluation of her performance in teaching subjects for which she lacked the designation of "Highly Qualified" under the No Child Left Behind Act (NCLB)?
- 2) If so, is the Appellant entitled to reinstatement to her position and back pay?

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<sup>2</sup> On January 6, 2017, a Notice of Substitution of Counsel was filed entering the appearance of Daniel Q. Mahone, Esquire, as counsel for the Appellant.

## SUMMARY OF THE EVIDENCE

### Exhibits

I admitted four exhibits on behalf of the County Board (which had been admitted into evidence by the Hearing Examiner), divided into four binders identified by subject matter. (Bd. Exs. A-D). I admitted thirty-three exhibits on behalf of the Appellant (which had been admitted by the Hearing Examiner) (App. Exs. 1-20, 22, 24-31, 33, 35-37).<sup>3</sup> A list of exhibits is attached to this Proposed Decision as an Appendix.

### Testimony

No testimony was presented to me because the matter was argued on the record submitted to the Hearing Examiner.<sup>4</sup>

I considered the testimony of the following witnesses on behalf of the County Board, which was presented before the Hearing Examiner:<sup>5</sup>

- Marie Bercaw, Certification Coordinator, Certification Unit, MCPS
- Robert Grundy, Director of Performance Evaluation and Compliance, Office of Human Resources and Development, MCPS
- Nakia Sutton, Consulting Teacher and Co-lead of Consulting Teacher Team, MCPS
- Joshua Munsey, Assistant Principal, Regional Institute for Children and Adolescents
- Michelle Schultze, Principal, Regional Institute for Children and Adolescents
- Matthew Niper, Assistant Principal, Rocky Hill Middle School (formerly Assistant Principal, Northwest High School)
- Dawn Fersch-Burns, Special Education Resource Teacher, Montgomery Village Middle School (formerly Consulting Teacher, MCPS)
- E. Lancelotti (Lance) Dempsey, Principal, Northwest High School
- Gary Barte, Montgomery County Association of Administrators and Principals Liaison for the Professional Growth System, Office of Human Resources and Development, MCPS

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<sup>3</sup> Exs. 21, 23, and 32 were not introduced. Ex. 34 was not admitted into evidence.

<sup>4</sup> Although I granted the Appellant's Request to Present Additional Material Testimony, she did not present such testimony at the hearing before me.

<sup>5</sup> Ms. Bercaw and Mr. Grundy were also present at the hearing before me but did not testify.

I considered the Appellant's testimony, which was presented to the Hearing Examiner; she did not present any witnesses on her behalf at that hearing.

### **FINDINGS OF FACT**

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

1. The Appellant has been employed by MCPS as a special education teacher since 2000. She has a Master's Degree in Special Education, a Master's Degree in Humanistic Education, and a Certificate of Advanced Studies in Administration. (Bd. Reply to Appeal, para 1; Bd. Ex. A3-026; App. Testim. at 588.)
2. At all relevant times, the Appellant was licensed by the State of Maryland and held a generic special education certification, which enabled her to teach elementary/middle school special education students from Grades 1 through 8 and secondary/adult students Grades 6 through 12, and held an Admin I certificate. (Bd. Reply to Appeal para. 6; Bercaw Testim. at 361.)
3. The Appellant was first assigned as a Special Education Transition Support Teacher (TST) at Northwest High School. (Bd. Reply to Appeal, para. 2; Bd. Ex. A1-051; App. Testim. at 591.)
4. As a TST, the Appellant participated in assessment, instruction, and consultation related to developing and coordinating transition activities for special education students to transition from public school to adult living. Her duties included teaching students work and life skills, and evaluating students' learning and career styles for developing their post-secondary options. (App. Testim. at 592; Bd. Ex. A1-001, 009-013.)
5. MCPS follows the Professional Growth System pursuant to which the following Performance Standards are applied in evaluations of teachers:

- I. Teachers are committed to students and their learning.
- II. Teachers know the subjects they teach and how to teach those subjects to students.
- III. Teachers are responsible for establishing and managing student learning in a positive learning environment.
- IV. Teachers continually assess student progress, analyze the results, and adapt instruction to improve student achievement.
- V. Teachers are committed to continuous improvement and professional development.
- VI. Teachers exhibit a high degree of professionalism.

(Bd. Ex. C-009, 064, 119; Grundy Testim. at 67; Dempsey Testim. at 482-483.)

6. The six Professional Growth System Performance Standards are all based on good pedagogy.<sup>6</sup> (Grundy Testim. at 46-47.)

7. In 2009, Lance Dempsey, Principal, Northwest High School, began to hear reports of concerns about the Appellant, including concerns about paperwork not being completed and Individualized Education Plans (IEPs) not being filled out appropriately.

(Dempsey Testim. at 488.)

8. During the 2010-2011 school year, Matthew Niper, then-Assistant Principal, Northwest High School, worked with the Appellant on the IEP process. A Cluster Transition Support Teacher provided the Appellant with individual coaching and assistance, including modeling the processes and procedures for conducting the student transition interview as well as structures to provide on-going evidence of student progress toward transition goals. The Support Teacher also provided the Appellant support in the use of Office of State Support (O/SS) and other county technology. (Bd. Ex. A1-051-052.)

9. At the end of the 2011-2012 school year, a Continuous Improvement Plan was developed for the Appellant. A Continuous Improvement Plan is a working document setting

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<sup>6</sup> "Pedagogy" is defined as "[t]he art or profession of teaching." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 965 (1982).

forth standards for teacher improvement and is developed with input from the teacher. ((Bd. Ex. A1-053; Niper Testim. at 394-95.)

***2012-2013 School Year***

10. During the 2012-2013 school year, the Appellant served as the TST for the Learning and Academic Disabilities Department (LAD) and the Emotional Disabilities Department (ED) and was responsible for the transitional support to the special education students at Northwest High School. In the fall semester, she taught two sections of College/Career Seminar; in the spring, she taught one section of College/Career Research and Development (CCRD). (Bd. Ex. A1-025, 051.)

11. At the beginning of the 2012-2013 school year, Mr. Niper became aware that the Appellant had not completed online information necessary for IEP meetings. After Mr. Niper expressed his concerns to the Appellant, she replied by email on September 24, 2012: “How do I know individuals are not erasing this information on purpose?” (Bd. Ex. B1-001; Niper Testim. at 381-385.)

12. On October 9, 2012, the Appellant emailed Mr. Niper that “[t]his Improvement Plan is becoming a vice. . . Meetings are becoming a vice. . . Meetings are use[d] in a negative manner.” (Bd. Ex. B1-002.)

13. The first goal of the Appellant’s Continuous Improvement Plan was for the Appellant to complete and share progress on transition goals, including data collection forms, and to maintain and consistently update transition data notebooks. When the Appellant met with Mr. Niper on November 1, 2012, she presented documentation only for the current school year and did not present a comprehensive file to document four years of student progress. (Bd. Ex. A1-025.)<sup>7</sup>

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<sup>7</sup> The exhibit indicates a date of November 1, 2013; however, in context, the correct date appears to be 2012.

14. Mr. Niper met with the Appellant bi-weekly until November 2, 2012, when the Appellant indicated that she continuously felt targeted and that Northwest High School wanted to get rid of her and was creating a paper trail against her because she is African American. (Bd. Ex. A1-053.) When Mr. Niper stated that that was not the case and that everyone improves when they work as a team and support each other, the Appellant referred to him as a politician and stated that politicians do not always tell the truth. (Bd. Ex. A1-053.) The Appellant stated that her attorney advised her to record her meetings and that she would not meet unless her accommodation was met. She made remarks about racism and stated that her attorney was advising her not to meet. (Bd. Ex. A1-053.)

15. On January 9, 2013, the Appellant attended a performance review meeting with Ms. Dempsey, Mr. Niper; and Karen Guthro, then-Special Education Resource Teacher. When the Appellant indicated she preferred standing to sitting, Ms. Dempsey directed the Appellant to sit at the conference table. The Appellant stated that Ms. Dempsey was ordering her like a slave. When Mr. Niper reviewed the status of student data notebooks, the Appellant disagreed with him that she had failed to complete notebooks for all grade levels. Ms. Dempsey then advised the Appellant that she had not been meeting the standards set out in the Continuous Improvement Plan and that she wanted to review the standards with her. The Appellant packed up her notebook, told Ms. Dempsey to just give her a copy of whatever she had, and grabbed the papers. She declined to sign a copy of the performance review and told Ms. Dempsey she could speak to her lawyer. (Bd. Ex. A1-016.)

16. During the 2012-2013 school year, the Appellant received suggestions, recommendations, directives, expectations and professional development supports from Kathy Kolan, Supervisor of the Transition Services Unit; Pamela Ekpone, Transition Support Specialist; and Northwest High School staff members including the staff development teacher,

administrators and the Resource Teacher for Special Education (RTSE). (Bd. Ex. A1-036.)

Observations of the Appellant's teaching performance took place on September 14, 2012, October 18, 2012, February 1 and 6, 2013, and March 5, 2013. (Bd. Ex. A1-024.)

17. When Mr. Niper observed the Appellant teaching a CCRD class on February 1, 2013, the objective of the lesson was that the students would be able to complete an error-free application. At that time, the Appellant's performance was deficient under the Standards as follows:

- The Appellant inconsistently checked for understanding during the lesson. (Standard II)
- The Appellant did not properly pace the lesson to maximize learning time. The Appellant provided the students with one, fifteen-minute activity that did not relate to the lesson's objective. The Appellant did not allow time to review the lesson and topic and did not allocate time to complete a summarizing activity for the lesson. (Standard III)

(Bd. Ex. A1-018-020; Niper Testim. at 404-408.)<sup>8</sup>

18. The Appellant's performance improved in some of the items tasked in the Continuous Performance Improvement Plan but she continued to make the same mistakes or raise the same concerns for most of the tasked items. (Niper Testim. at 410.)

19. On March 21, 2013, the Appellant received a Below Standards rating as part of her Professional Growth System Evaluation Report. As of that date the Appellant had not met the performance criteria set forth in Standards I-VI. (Bd. Ex. A1-024-136; App. Exs. 2, 3; Dempsey Testim. at 493-504.)

20. The MCPS Peer Assistance and Review (PAR) program is a program developed jointly by the Montgomery County Education Association (MCEA), the Montgomery County Association of Administrators and Principals (MCAAP), and MCPS as a mechanism for

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<sup>8</sup> Bd. Ex. A1-027 indicates that on October 18, 2012, "Mr. Paushter" observed the Appellant's teaching performance.

maintaining system-wide quality control and ensuring that all MCPS teachers meet MCPS Standards of Performance. The purpose of the PAR program is to assist all teachers to meet standards for proficient teaching. (Bd. Ex. C-021, 076, 131.)

21. The PAR program is made up of two components: the PAR Panel, consisting of teachers and principals, and “Consulting Teachers” (CTs),<sup>9</sup> who are experienced teaching professionals. (Bd. Ex. C-015, 070, 125; Bartee Testim. at 543-544).

22. The focus of the PAR program is to improve instruction by supporting under-performing teachers and novice teachers. (Bd. Ex. C-015, 070, C125.) Through the PAR program, intensive, individualized assistance is provided for experienced teachers who are judged to be “below standard.” (Bd. Ex. C-015, 070, 125; Grundy Testim. at 46; Bartee Testim. at 546.)

23. Principals or supervisors who have concerns about a teacher’s performance may request that the teacher be included in the PAR program. The PAR program consists of two formal observations of the teacher by a CT to document if there are any concerns with the teacher’s performance. If the CT reports that the teacher is not meeting standards, and the PAR Panel concurs, the PAR Panel notifies that teacher that she will be included in the PAR process for the next year. A referral is made to the Office of Human Resources and Development to place the teacher in the PAR program for the following school year. (Grundy Testim. 50-52.)

24. During the PAR year, a CT is assigned to work one-on-one with the teacher and collect data through formal observations. The CT generally meets weekly with the teacher, conducts formal and informal observations of the teacher, and reports monthly on the progress of the teachers to a PAR pair (one teacher and one principal who are members of a PAR panel), who are assigned to oversee the work of a small group of CTs. The CT writes a mid-year report,

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<sup>9</sup> “CTs are experienced teaching professionals who are selected by a PAR panel.” (Bd. Ex. C-016.)

which is reviewed by the PAR Panel, and then writes a final report at the conclusion of a period of support. In addition, the principal makes a recommendation to the PAR panel as to whether the teacher should be dismissed, continue in the PAR program for a second year, or be released from the PAR program as meeting standard. (Bd. Ex. C-015 -017, 071-073, 126-128; Grundy Testim. at 53-63; Bartee Testim. at 566-568.)

25. Based on the data and information gathered through the PAR program, the PAR panel makes recommendations in May (for tenured teachers) to the superintendent regarding contract renewal, a second year in the PAR program, or contract termination. The PAR Panel renders a tentative recommendation, which the teacher or principal can appeal. The PAR Panel then makes a recommendation to the Superintendent of Schools. (Bd. Ex. C-015, 016, 071, 072, 126, 127; Grundy Testim. at 63; Bartee Testim. at 548.)

26. On March 21, 2013, Ms. Dempsey rated the Appellant's performance as Below Standards and recommended that she be placed into the PAR program for the 2013-2014 school year. (Bd. Ex. A1-036.)

27. On May 8 and May 21, 2013, Carolyn Tyc, CT, observed the Appellant to determine whether she was appropriate for the PAR program. (Bd. Ex. A1-039-042, 044-047; App. Ex. 4.) Based on those observations, in May 2013, Ms. Tyc recommended that the Appellant be included in the PAR program. At that time, the Appellant had exhibited the need for improvement based on the following:

- The Appellant had little evidence that she had regularly communicated with all students and parents in order to meet IEP transition goals. (Standard I)
- She had struggled to establish an organizational system for collecting and analyzing student information so as to prioritize goals and objectives as a pre-requisite to providing transition support. (Standard II)
- She did not adequately frame her instruction so as to set the Big Picture by providing a purpose for learning.

- She tried summarizing at the end of a lesson, but students were writing and not paying attention.
- She asked students to write about who helped form their ethical behaviors, but the Appellant did not connect that task to the lesson.
- She did not elicit student discussion on the lesson objective. (Standard II)
- She had had mixed success in collecting sufficient data to assess progress on transition goals. (Standard IV)
- She did not extend student thinking by asking higher level questions or allowing students to complete work independently. (Standard IV)

(Bd. Ex. A1-039 – 047; App. Exs. 4-5).

28. On May 30, 2013, Ms. Dempsey agreed with Ms. Tyc's recommendation. (App. Ex. 5.)

29. In June 2013, the PAR Panel determined that the Appellant would receive the support of the PAR program. (Bd. Ex. A-049.)

30. By letter dated June 6, 2013, the Appellant was notified by the PAR Panel of her inclusion in the PAR program and that her CT would be in touch with her during the summer.

(Bd. Ex. A1-049-050; App. Ex. 6.)

**2013-2014 School Year**

31. Dawn Fersch-Burns was assigned as the Appellant's CT for the 2013-2014 school year. The Appellant did not respond to Ms. Fersch-Burns' attempts to contact her by email on July 29, 2013, August 19, 2013, and August 28, 2013. She did not respond to attempts to contact her by telephone on August 20 and 21, 2013. Ms. Fersch-Burns also attempted an informal observation on August 27, 2013, but the Appellant was not present when she arrived.<sup>10</sup> (Bd. Ex. A2-010-013; Fersch-Burns Testim. at 438.)

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<sup>10</sup> It was not made clear if the Appellant was absent for the day.

32. On September 3, 2013, after communication with Mr. Niper about her belongings being moved to another office, the Appellant sent an email to Christopher S. Garran<sup>11</sup> containing numerous spelling and punctuation errors, stating, “It need to be known after the Hostle treatment I as a black woman received from a white male co-worker in front of students and hostile treatment I receive from two white male administrators and the displacement and constant rummaging through my work passion. I am afraid for my life . . . . The principal has been site on mcps live for her bully tactics by parents towards me. Yes I am afraid for my life.” (Bd. Ex. B1-012.)

33. Ms. Fersch-Burns attempted to informally observe the Appellant on September 9, 2013, but the Appellant would not let her in the classroom, indicating that she had just returned to work and was not ready to be observed. She did agree to meet with Ms. Fersch-Burns after class. (Bd. Ex. A2-011, 013; Fersch-Burns Testim. at 438-39.)

34. When they met after class on September 9, 2013, the Appellant advised Ms. Fersch-Burns that she did not believe she should be in the PAR program, the administration was not receptive to her teaching and was very negative and hostile towards her, meetings with the administration did not go well, and she felt that she was being targeted. (Fersch-Burns Testim. at 440-442.)

35. The Appellant recorded part of the September 9, 2013 meeting on her telephone after Ms. Fersch-Burns told her that meetings were not to be recorded. When Ms. Fersch-Burns told the Appellant that she had been a CT for twenty years, the Appellant asked Ms. Fersch-Burns if she was lying. She asked Ms. Fersch-Burns if her surname was Jewish. (Bd. Ex. A2-010.)

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<sup>11</sup> Mr. Garrann’s position was not identified. The exhibit show that a copy of the email was forwarded to Ms. Dempsey and then to Mr. Niper.

36. The Appellant was on leave from approximately September 13, 2013 to October 14, 2013. (Bd. Ex. A2-011.)

37. Ms. Fersch-Burns observed the Appellant teaching CCRD on October 25 and 31, 2013.<sup>12</sup> On those dates, the Appellant presented a video to the class entitled, "Dirty Jobs." She did not use wait time with students to allow them time to process questions and did not include random calling strategies in the lessons so that all students were held to the same participation expectations. She did not provide an introduction to the video to explain the learning objectives and did not pause the video to check for student processing and understanding. The Appellant did not have enough hand-outs for all the students; did not tell students if hand-outs would be graded; and did not circulate to see if students were documenting notes on the handouts. In addition, there was no closure to the lesson or checking for understanding during the lesson. (Bd. Ex. A2-007-009; Fersch-Burns Testim. at 443-46.)

38. The Appellant took long-term leave and was absent from November 4, 2013 until April 21, 2014. (Fersch-Burns Testim. at 446-47, 467-68.)

39. On December 6, 2013, Ms. Fersch-Burns issued a PAR Mid-Year Summary indicating that the Appellant did not currently meet standard, but noting that the Appellant had been out on leave since November 4, 2013. (Bd. Ex. A2-001; Fersch-Burns Testim. at 461.)

40. Generally, when a teacher is on leave for more than sixty consecutive days, her position is considered vacated so that the principal can fill the position to provide some continuity to the students. When the teacher returns from leave, she is placed on an involuntary placement/priority placement list. (Grundy Testim. at 85.)

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<sup>12</sup> Ms. Fersch-Burns attempted unsuccessfully to observe the Appellant on October 23 and 30, 2013, but the Appellant was not present when the CT arrived. It was not made clear if she was absent those days. (Bd. Ex. A2-011.)

41. The Appellant was cleared to return to work effective April 21, 2014 (after Spring break). Because she had been on leave over sixty days, the position she formerly held was no longer available.

42. On April 9, 2014, Linda Johnson, Staffing Coordinator, notified the Appellant that she had been assigned to a full-time special education co-teaching position at Northwest High School for the remainder of the 2013-2014 school year. The Appellant's name had been added to the priority placement list for a position for which she was certified for the 2014-2015 school year and she was encouraged to apply to available positions for the fall. If she did not find a position through the voluntary process, she would be assigned to one. The Professional Growth System would continue to be implemented upon the Appellant's return to work. (Bd. Ex. A2-011; App. Ex. 17.)

43. On April 9, 2014, the Appellant emailed Ms. Johnson, stating, "I need to know what I am co-teaching and the IEP case management load since I was not train [sic] to do the complete IEP and I also need to know the subject content[.]" (App. Ex. 17.) Ms. Johnson responded: "MCPS contractually owes you a position for which you are certified. Your only certification is special education, so you have been assigned to the available special education position at Northwest High School, which is a special education co-teaching position. (App. Ex. 17.) The letter advised the Appellant that Ms. Dempsey would inform her of the specifics of the co-teaching position when the Appellant reported to her on April 21, 2014. (App. Ex. 17.)

44. Sometime prior to April 21, 2014, Ms. Johnson placed the Appellant on a transfer list. On April 21, 2014, the Appellant emailed her thanking her for doing so and stating that "[i]t is important that my certifications are accurate in order to be placed in a job that is not a hardship." (App. Ex. 19.) Ms. Johnson responded that MCPS would contractually owe the Appellant a teaching position should she not acquire one through the voluntary transfer process.

“As your only certification in terms of teaching is in special education, you will be assigned to a full-time special education position.” (App. Ex. 19.)

45. Beginning on April 21, 2014, the Appellant co-taught four resource room classes and helped in the resource room for the remainder of the school year. In that capacity, the Appellant helped students who came in for assistance with their studies and worked on their IEP goals. This included support with assignments, projects and preparing for assessments in their content area and elective courses. The Appellant also co-taught one period of Spanish II. (App. Ex. 20; Fersch-Burns Testim. at 450; Dempsey Testim. at 511-516; App. Testim. at 625, 627.)

46. When the Appellant returned to work in April 2014, she and her attorney met with Ms. Dempsey. They discussed the Appellant’s duties in the resource room. In addition, the Appellant raised the issue of her resource room responsibility to complete entire IEPs. She requested IEP training because she had not done a complete IEP before as a TST. No one at Northwest High School subsequently provided her with training on how to complete IEPs. (App. Testim. at 628-629, 630.)

47. On April 21, 2014, Ms. Fersch-Burns emailed the Appellant that she was resuming contact with her, would continue with the PAR process, and would complete a final summative report. She asked to schedule a pre-conference, formal observation and post-conference on April 23, 2014. The Appellant responded, agreeing to the observation time and asking what exactly Ms. Fersch-Burns was looking for. The Appellant stated, “I have to learn the system.” (App. Ex. 18.) Ms. Fersch Burns responded that she would be looking for evidence in accordance with the teaching standards. (App. Ex. 18.)

48. On April 23, 2014, Ms. Fersch-Burns had a pre-observation conference with the Appellant and then formally observed her co-teaching in a resource room. The Appellant

worked primarily the entire period with one student using a financial literacy program. At a point in the module where there were practice questions in which the student had to select one out of four choices, the Appellant did not conduct a discussion on test-taking strategies such as ways to eliminate multiple choice answers during test taking. She did not ask specific questions or use summarizing to see if the student had grasped information. (Bd. Ex. A2-003, 004-005; App. Ex. 20; Fersch-Burns Testim. at 447, 449-453.)

49. As of the date of Ms. Fersch-Burns April 29, 2014 Final Summative Report, the Appellant's performance as a special education teacher was deficient, including the following:

Standard I

- The Appellant did not use wait time with students to allow them time to process questions and did not include random calling strategies in the lessons so that all students were held to the same participation expectations.

Standard II

- The Appellant did not provide an introduction to the "Dirty Jobs" video on October 25, 2013, in order to set the purpose for student learning and did not pause the video to check for student processing and understanding.
- She did not have the students engage in a discussion relating to the objective of the lesson on October 25 or 31, 2013.

Standard III

- The Appellant was not consistently well-provisioned for classroom instruction
- The Appellant did not maintain a positive classroom environment as follows:
  - swatted a student's arm on October 31, 2013, while he was up at the teacher's desk, demonstrated frustration with students who were off task and talking, and threatened to call students' parents in front of the entire class when initial warnings did not work.

Standard IV

- The Appellant did not tell students on October 25 and 31, 2013, if handouts would be graded.

- The Appellant did not probe with specific questioning or summarizing on April 23, 2014, to see if the student had grasped all of the information that was read.

Standard VI

- The Appellant did not respond to initial email requests and telephone messages from the CT; would not allow the CT access to the classroom for an informal observation on September 8, 2013; recorded part of the September 9, 2013 meeting after being told not to do so; and asked the CT if she was lying and if her surname is Jewish.

(Bd. Ex. A2-006-011.)

50. On April 29, 2014, Ms. Fersch-Burns concluded that the Appellant was not meeting standards. On April 30, 2014, after reviewing Ms. Fersch-Burns' Final Summative Report, Ms. Dempsey agreed. Based upon the data on the Appellant's performance, Ms. Dempsey recommended to the PAR Panel that the Appellant be dismissed from her employment as a teacher with MCPS. (Bd. Ex. A2-011, 014.)

51. By email dated May 8, 2014, the MCPS notified the Appellant that she would be assigned for the 2014-2015 school year to teach English at John L. Gildner Regional Institute for Children and Adolescents (RICA) (a public special day school for students with special education needs that cannot be met in the comprehensive public school). The email advised the Appellant that should she desire a different assignment, she was encouraged to search and apply for positions for which she was certified, via MCPS Careers. (App. Ex. 24.)

52. On or about May 15, 2014, after a review and discussion of the documentation and information presented by Ms. Fersch-Burns, the PAR Panel determined that the Appellant's instructional skills did not meet the standard of performance required by MCPS. Nonetheless, because the Appellant had been out on sick leave most of the 2013-2014 school year, the PAR Panel recommended to the Superintendent of Schools that the Appellant's teaching contract for the 2014-2015 school year be renewed and that she receive a second year of support in the PAR

program. (Bd. Ex. A2-020; Bd. Reply to Appeal, para. 5; Dempsey Testim. at 510-511; Bartee Testim. at 573-74.)

53. On May 30, 2014, Ms. Fersch-Burns developed a Growth Plan for the Appellant which included performance goals, and strategies and activities to achieve those goals. (App. Ex. 25.)

**2014-2015 School Year**

54. On June 9, 2014, the Appellant was assigned to teach three periods of Grade 9 English and two periods of Grade 7 Social Studies at RICA. (App. Ex. 26.)

55. The Appellant did not hold a certification in English or Social Studies and did not have a NCLB “Highly Qualified” designation for those core subjects. She had never taught those subjects before. She never took any formal course work in English or any practicum in English. ((Bd. Reply to Appeal, para. 6; Bercaw Testim. at 363-364; App. Testim. at 648; App. Testim. at 656-657, 665.)

56. After she was notified of her English teaching assignment, the Appellant contacted Ms. Schultze (Principal at RICA) at the end of June or in early July, about taking a co-teaching English 9 course offered during the summer, but was advised that RICA did not have a co-teaching model.<sup>13</sup> The Appellant took a Speakers of Other Languages (ESOL) class and downloaded the curriculum for English 9 while taking that course, but had difficulty understanding the downloaded information. (App. Testim. at 670-671.)

57. After she was notified of her Social Studies teaching assignment, the Appellant requested help from the head of the Social Studies Department at RICA. He directed her to the former Social Studies teacher, who gave the Appellant a packet of handouts. In August 2014, the Appellant went online to download the curriculum, but had difficulty understanding it. She

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<sup>13</sup> Neither party made clear what that response meant in terms of taking an English co-teaching summer course.

subsequently contacted a retired Social Studies teacher, who tried to help the Appellant with some lesson plans and with the vernacular and content material. (App. Testim. at 666-68.)

58. Prior to the Appellant's assignment to teach English and Social Studies at RICA, the MSBE adopted a High, Objective, Uniform State Standard of Evaluation (HOUSSE) as a way for Maryland's veteran teachers to achieve the designation of "Highly Qualified" under the NCLB.<sup>14</sup> (App. Ex. 37.)

59. The MCPS did not review the Appellant's record prior to assigning her to teach English and Social Studies to see if she met the "Highly Qualified" designation under the NCLB, based on a review of her record and applying HOUSSE standards. (Bercaw Testim. at 370.)

60. When she began at RICA, the Appellant told Ms. Schultze that she was not familiar with the subject matter of English 9. (App. Testim. at 649.)

61. Once she started at RICA, the Appellant contacted an English teacher, Fran Coffinger, for help, but she was not able to assist. The Appellant's subsequent request for a mentor in English was denied because she had been assigned a CT. The former Grades 7 and 9 English teacher came in approximately five times to review material used by the Appellant to teach and students' work. (App. Testim. at 670-673.) The Appellant was not advised until the second semester that she could download lesson plans. (App. Ex. 678-79.)

62. The Appellant did not understand the content material for English (Grade 9) and Social Studies (Grade 7) and did not know how to teach those subjects. She was learning as she went along. (App. Testim. at 673-674.)

63. The Appellant began working with a new CT, Nakia Sutton, for the 2014-2015 school year. In addition to holding other positions and being trained as and serving as a CT for approximately three years, Ms. Sutton had taught sixth and seventh grade English, and Civil

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<sup>14</sup> As discussed below, a Post-Hearing submission accepted by the Hearing Examiner in the hearing before him, which I admitted as App. Ex. 37, indicates that the availability of HOUSSE would expire at the end of the 2013-2014 school year.

Rights, and served as a reading support teacher in middle school Social Studies. Ms. Sutton conducted a series of formal and informal observations on August 28, 2014, September 5, 17 and 26, 2014, October 3, 14, 15, and 27, 2014, November 5, 12, and 25, 2014, and December 3 and 15, 2014. In addition, a series of formal post-conferences and informal meetings were held throughout the first semester. (Bd. Ex. A3-034; Sutton Testim. at 184.)

64. On September 23, 2014, the Appellant advised John Munsey, Assistant Principal, RICA, that she had never written an IEP (she had only done the transition pages) and was very concerned about getting in trouble over writing IEPs. She stated that she had been to Central Office six times for IEP concerns, and that she did not want to have a “Northwest situation” again. She indicated that she needed help with IEPs and Mr. Munsey indicated that help would be provided. The Appellant further indicated to Mr. Munsey that she could not participate in IEP meetings because she did not want to speak in front of people. The Appellant repeatedly told Mr. Munsey that she hated him, but loved and respected him. (Munsey Testim. at 223; Bd. Ex. 2.<sup>15</sup>)

65. Special educators are expected to know how to write an IEP and participate in IEP meetings. Mr. Munsey worked with the Appellant on how to do her IEPs, demonstrating how to implement data information into an IEP. (Munsey Testim. at 223.)

66. In October 2014, Ms. Sutton had the Appellant visit a seventh grade English teacher to observe best teaching practices, not to learn the content. (Sutton Testim. at 148-149.)

67. On October 6, 2014, the Appellant emailed Ann Brado, Ed. S., Special Education Instructional Specialist, MCPS, who had met with her, that she felt as if she was being bullied and asked Ms. Brado not to make her feel as if she had a covert agenda. (Bd. Ex. B2-003.)

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<sup>15</sup> The exhibit did not show a Bates page.

68. Ms. Sutton conducted a formal observation of the Appellant's Social Studies class on October 15, 2014 when the Appellant was conducting a guided practice portion of a lesson on the Byzantine Empire and Orthodox Christianity. At that time, the Appellant missed opportunities to communicate to students what they were supposed to do with graphic organizers and note taking, and did not clearly instruct students as to which map they should use. The students were confused as they performed the note-taking activity. (Bd. Ex. A3-010, 012.)

69. Ms. Sutton developed a November 4, 2014 Growth Plan for the Appellant, which included performance goals and strategies and activities for improvement. (Bd. Ex. A3-001-004; App. Ex. 27.)

70. At the time of an informal observation of an English class by Ms. Sutton on November 7, 2014, the Appellant did not provide clear instruction to students. The instructional flow was erratic. The Appellant did not make clear transitions from vocabulary warm-ups to a quiz to handing out novels and then to a review of the agenda on a Power Point. Instructions were not explained until students understood and the students appeared confused by her discussion about family relationships. The purpose of a study guide was not framed, but just handed out and started. No model or guiding instructions were presented for a graphic organizer to be used by students to compare a novel with an MLK speech.<sup>16</sup> The Appellant did not explain how the students were to work in elbow groups. There were so many materials and activities, without clear, explicit instructions and framing, that students appeared confused about what they were supposed to do. In addition, the Appellant forgot she had already read something in the material, and did not clearly communicate to the students that they were to read a speech. (App. Exs. 27-28.)

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<sup>16</sup> I assume "MLK" refers to Martin Luther King.

71. On December 3, 2014, Ms. Sutton conducted a formal observation of the Appellant teaching an English class comparing a play to a poem. The Appellant's performance was deficient as follows:

- The Appellant did not effectively communicate to students what they were supposed to do in an order that supported them in following the lesson sequence. She gave them unclear directions regarding where she was reading from in the text to enable them to follow along.
- She moved into the reading of a poem without reading the writing prompt to make her students aware of the purpose for the reading and missed the opportunity to explain how answering questions about a poem should be used as part of their responses. She did not break down student tasks into segments (scaffold) so that they could successfully complete a written response to a question about how the poem compared to the play.

(Bd. Ex. A3-013-15.)

72. Ms. Sutton issued a December 15, 2014 PAR Mid-year Summary, summarizing the areas in which the Appellant was having difficulty with regard to Standards I-IV.<sup>17</sup> She reported to the PAR Panel that the Appellant did not meet standards. (Bd. Ex. A3-016, 017.)

73. On December 17, 2014, the Appellant arrived late to a school team meeting in the principal's conference room. Because all the chairs were taken, the principal asked the Appellant to bring in a chair from the main office. After the meeting, the Appellant asked the principal why he was racially profiling by asking the Appellant and another African-American employee to get chairs. (Bd. Ex. B2-013; Munsey Testim. at 242.)

74. Ms. Sutton conducted a series of formal and informal observations on January 9, 21 and 28, 2015, February 5, 6, 10, 20 and 27, 2015, March 11, 18, and 23, 2015, and April 16 and 21, 2015. In addition, a series of formal post-conferences and informal meetings were held throughout the second semester. (Bd. Ex. A3-034.)

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<sup>17</sup> Ms. Sutton indicated that she informed the appellant that she really did not look at professionalism (Standards V and VI) – it was up to the school to do that. She further testified that she took the professionalism piece out of the Appellant's Growth Plan because there were never any professionalism issues between them and that what was most important to Ms. Sutton was for her to be able to support the Appellant in Standards I through IV, her instructional practices. (Sutton Testim. at 107.)

75. On January 28, 2015, Ms. Sutton requested the Appellant to observe her peer teaching math. (Sutton Testim. at 149.)

76. At a February 5, 2015, post-observation conference, the Appellant argued loudly with Ms. Sutton. When she was told that she was being loud and argumentative, the Appellant denied she was yelling and accused other staff of aggressive body language and bias. (Bd. Ex. A3-060.)

77. On February 6, 2015, Ms. Sutton had a data chat with the Appellant, which provided Ms. Sutton the opportunity to talk with her about how the students were doing as far as their grades and to look at the Appellant's teacher's grade book. The Appellant presented no evidence that she was conveying to the students where they stood in terms of grades. Therefore, Ms. Sutton asked Joshua Munsey, Assistant Principal, RICA, if the school could provide more support to the Appellant in improving her performance with regard to grade books. (Sutton Testim. at 165.)

78. During subsequent observations and conferences, Ms. Sutton did not see evidence that the Appellant was conveying to students where they stood in terms of grades. (Sutton Testim. at 164, 165, 169.)

79. The objective of the English class observed by Ms. Sutton on March 18, 2015, was for students to be able to analyze the class text via reading and answering the study guide question for various chapters. At that time, the Appellant's performance was deficient, including the following:

- The Appellant did not guide students in fully understanding meanings of terms and how to use context clues to determine those meanings. In addition, students were expected to answer questions at the literal level with few opportunities to explain or discuss how each event helped the reader understand the author's purpose. During the final twenty minutes of class, students visited the media center, but only one of five students actually sat and read.

- She missed the opportunity to communicate the “Big Picture” (the unit theme to which tasks were related) to the students. She did not communicate the curricular goals in the written/posted objective or throughout instruction and missed the opportunity to guide students in connecting the goals as she discussed the events in the text. She did not incorporate academic language into her lesson to expose students to instruction that supported the curricular goals, county assessments, or a general understanding of terminology used when analyzing literature.
- She never asked the students what they had completed with a substitute teacher, was unable to present writing samples or share how the data from their work would guide her instruction moving forward, and was unable to provide a sample vocabulary quiz or recorded data on how students were progressing in vocabulary development.

(Bd. Ex. A3-018 - 021.)

80. On April 21, 2015, Ms. Sutton conducted a formal observation of the Appellant teaching a World Studies class relating to the effectiveness of European exploration. At that time, the Appellant’s performance was deficient, including the following:

- The Appellant asked students questions at the literal level and did not have them make connections or explain why the exploration was or was not effective. As students watched a video on the life of Magellan and answered the guiding questions, they continued to answer questions without making a connection to the lesson objective and the Appellant moved on to summarize without questioning the students about the effectiveness of the exploration discussed.
- When a student expressed confusion as he began to read a question regarding a video activity, the Appellant stated, “This doesn’t make sense. I may have made some errors, but I tried to re-read it. Something on the ship – you’ll see.” (Bd. Ex. A3-023.) She then continued with a second video. She did not clearly explain how students were to use or organize information on an additional sheet of paper.
- She had mixed success in checking for student understanding. She provided statements for students to respond to as they watched videos on the explorations of Magellan and Balboa; however, students did not use that information to explain the effectiveness of each exploration. The Appellant was unable to present to Ms. Sutton students’ written responses or the handout that the Appellant did not ask students to explain at the end of the class the effectiveness of the exploration, or how the ships they learned about in the video played a role in the effectiveness of the voyage.

(Bd. Ex. A3-022 – 025; Sutton Testim. at 171-174.)

81. Ms. Schultze and Mr. Munsey performed a series of informal and formal observations of the Appellant on September 5, 2014, November 7, 2014, February 2, 2015 and April 23, 2015. (Bd. Ex. A3-054.) In addition, a series of informal and formal conferences were held on September 8, 2014, November 10, 2014, February 5, 2015 and April 28, 2015.<sup>18</sup> (Bd. Ex. A3-054.)

82. When Ms. Schultze observed the Appellant teaching a class on September 5, 2014, the Appellant did not provide clear instruction to students. Much of the information on a poster paper with objective and agenda next to the Promethean Board (an interactive whiteboard that is connected to a computer on which a teacher can develop several types of things, such as videos or visual displays) was illegible. In addition, she skipped some directions and the objective was written at the activity level rather than the mastery level, i.e., just indicating what the activity was and not what the students were expected to know at the end of the lesson and how it was going to be measured. (Bd. Ex. A3-056; Schultze Testim. at 267-68; Sutton Testim at 123.)

83. When Ms. Schultze observed the Appellant teaching an English class on November 7, 2014, the Appellant did not explain instructions until the students understood, instructional flow was erratic, and the assignment was not clearly explained – no model or guiding instructions were presented to assist students with comparing a novel with a speech. There were so many materials and activities, without clear, explicit instructions and framing that the students appeared to be confused about what they were supposed to do. (Bd. Ex. A3-046-047, A3-056 – 058; App. Ex. 29; Schultze Testim. at 270-273.)

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<sup>18</sup> Although the last page of Ms. Schultz's Final Evaluation Report indicates that informal observations were also conducted by the Assistant Principal in December 2014 and May 2015, the first page does not reflect those observations. (Bd. Ex. A3-054, 062.)

84. The Appellant again told Ms. Schultze on November 7, 2014 that she was not certified to teach English or Social Studies and that she did not have sufficient content knowledge in Social Studies. (App. Testim. at 649-650.)

85. During the post-conference on November 10, 2014, the Appellant stated again to Ms. Schultze that she was not certified to teach English and that she did not hold a special education certification to teach English. (App. Testim. at 656.)

86. Ms. Schultze initially indicated on a Post Observation Conference Report relating to the November 10, 2014 conference that the Appellant was certified in generic special education, special education English. (App. Ex. 28; App. Testim. at 651-652.)

87. In response to an email sent by the Appellant on or about November 14, 2014, Marie Bercau, Certification Coordinator, Certification Unit, MCPS, advised the Appellant as follows: "You're not certified in general education or designated [Highly Qualified] to teach English to special education students, which would be 'Spec Ed English' in the data base. You are only certified in special education and Admin 1." (Bercau Testim at 362-363; App. Ex. 30.)

88. Ms. Schultze subsequently amended her Post Observation Conference Report relating to the conference on November 10, 2014 to read that the Appellant was "certified in Generic Special Education." (App. Exs. 29, 31; App. Testim. at 659-660.)

89. In January 2015, the Appellant was reminded of the importance of maintaining professional behavior towards colleagues after a para-educator reported that she had called her a snitch. (Bd. Ex. A3-060.)

90. In January 2015, the Appellant obtained permission from Ms. Schultze to attend an English curriculum training course and enrolled in that class; however, it was cancelled due to a snowstorm. (App. Testim. 676.)

91. When Mr. Munsey observed an English class taught by the Appellant in February 2015, the Appellant's performance was deficient, including the following:

- The Appellant provided explanations that were limited, vague, or lacked coherence.
- The Appellant did not adapt instruction based on assessment information. She assigned the brief constructed response (BCR) despite knowing that the students did not have the comprehension to answer it. She planned activities for coverage, not for instruction.

92. After not being able to meet at three potential meeting times for the February post conference meeting, the Appellant advised she could not participate in a fourth proposed post observation conference because she had to leave soon, but then remained at school for another hour. When Mr. Munsey advised the Appellant that he could not meet on a particular day, the Appellant responded that the report should be written without a conference, stating, "You [sic] just going to write what you want anyway and twist my words around, so it's no point." She accused Mr. Munsey of being biased towards her. (Bd. Ex. A3-040, 041, 042, 060.)

93. In February and March 2015, the Appellant had to be reminded by email four times to meet professional obligations in a timely manner. (Bd. Ex. A3-060.)

94. When Ms. Schultze observed the Appellant teaching English class on April 23, 2015, the Appellant's performance was deficient, including the following:

- The Appellant called on a student to go to the board to write student answers, but then lost track of what she was writing. She asked one student to read the part of Romeo, then had another student actually read it. Assignments of parts to read from a play and breaking students into groups appeared to be done spontaneously, without prior preparation. A student dominated a group and there was no assignment of cooperative group duties.
- She did not discuss the objective of the lesson.
- A student needed to turn on ActiveInspire (the technology that activates a Promethean Board) for the Appellant.

- She missed the opportunity to share the correct meaning of a word. A variety of explanatory devices matched to the objective, such as highlighting or graphic organizers were not used.
- The Appellant either did not notice or did not address problem behavior.

(Bd. Ex. A3-055, 056, 058, 059; Munsey Testim. at 222.)

95. The Appellant received support from numerous other RICA administrators and teachers, including co-teaching by a RICA special education teacher; modeling effective teaching during peer visits with RICA special education teachers; and monthly planning meetings with English Department team members. She received assistance from a Middle School Program Specialist in revising IEPs, learning how to write up behavior reports, and in editing Functional Behavior Assessments (FBAs) and Behavioral Intervention Plans (BIPs). She also received assistance from a Media Specialist with a Promethean Board, locating curricular materials, and troubleshooting technology problems. Administrators at RICA provided classroom observations and conferences with feedback. (Bd. Ex. A3-063, 064.)

96. The Appellant received assistance from Mr. Munsey on how to use a Promethean Board and ActiveInspire, but she never showed evidence that she ever used ActiveInspire. (Munsey Testim. at 247; Schultze Testim. at 324.)

97. Sometime during the fourth quarter when she had to teach Shakespearean English, the Appellant asked Mr. Munsey for assistance. He gave her access to the English forum (lessons that are given from the county) and they downloaded lesson plans, but she did not understand them. (App. Testim. at 670, 679.)

98. At the time of Ms. Sutton's April 29, 2015 Final Summative Report, the Appellant had deficiencies in her performance, including the following:

### Standard I

- The Appellant rarely asked students to explain or justify their responses when summarizing lessons and missed opportunities for follow up questions that directly connected to the objective.
- She missed an opportunity to support students in unlocking a prompt and determining how to approach a writing task.

### Standard II

- The Appellant had mixed results planning and delivering lessons that communicate the “Big Picture” including the following:
  - did not provide instruction to students that prepared them in completing common tasks from the English curriculum
  - did not assess students on skills relating to commonly confused words and figurative language
  - did not use the term, “author’s style,” which could have served as an introduction to a common task requiring students to imitate the author’s style.
- She missed opportunities to use appropriate materials and explanatory devices to provide instructional clarity as follows:
  - presented students with information and/or directions that were difficult to see and/or understand
  - broke students up into groups to brainstorm but did not explain what she wanted them to brainstorm, how to organize their responses, or where to locate information to support their responses
  - handed out pages of a handout that were not in order
  - gave no examples or explicit instructions on how to write a simile.
- She did not consistently plan lessons that appeal to students with multiple learning styles as follows:
  - missed opportunities to use the lesson activators to engage students
  - had not attempted to use ActiveInspire as a way to further engage students
  - rarely allowed enough time for students to complete a well-developed response to BCRs.

### Standard III

- The Appellant had mixed success in addressing disruptions and off task behaviors, and at times missed the opportunity to explain her expectations.
- She did not consistently monitor the pace of the lesson as follows:
  - allowed a warm-up to take up half of a class period
  - did not allow adequate time for students to complete a fully developed written response to a writing task.

#### Standard IV

- The Appellant inconsistently provided feedback to her students on their written responses, verbal responses, and overall class grades as follows:
  - did not follow through with explanations for expressions of pride in the students
  - did not provide students with progress reports, reference missing assignments, or offer students opportunities to be reassessed
  - did not conference with students to provide feedback on their written responses or any other activity or assessment and did not hand back papers to students with grades or written feedback.
- She read a poem without reading the writing prompt to the students and did not provide them with her expectations for organizing and supporting their answers.
- She did not provide a writing rubric or any other form of guidelines to set expectations for student work.
- She did not explain to students how their work would be graded or if assignments would be counted as formative or summative assessments, and did not state point values and breakdowns of those points. She missed an opportunity to read and explain guidelines relating to the use of an acronym to the students.
- She did not always use questions to check for understanding that connected to the lesson objective, did not give a clear understanding of what she wanted students to gain or learn from the lesson, and did not ask students to explain the lesson objective.

(Bd. Ex. A3-026-032.)

99. Ms. Sutton reported that based on her observations, the Appellant exhibited a high degree of professionalism. She actively participated in all meetings with Ms. Sutton, responded to all emails from her in a timely manner, and made Ms. Sutton aware of absences and changes to her teaching schedule. (Bd. Ex. A3-033.)

100. In her April 29, 2015 Final Summative Report, signed May 5, 2015, Ms. Sutton concluded that the Appellant's performance was Below Standard. (Bd. Ex. A3-034.)

101. By letter dated May 7, 2015, the PAR Panel notified the Appellant that it was considering a recommendation that the Appellant's teaching contract be terminated. The letter

also advised the Appellant that she had a right to appear before the PAR Panel prior to its final recommendation. (Bd. Ex. C-001.)

102. At the time of Ms. Schultze's May 18, 2015 Final Evaluation Report, the Appellant had deficiencies in her performance, including the following:

Standard I

- The Appellant did not use instructional strategies that resulted in measurable academic growth and achievement of all students on system-wide measures.
- She did not use equitable practices that reflected high expectations for all students.

Standard II

- The Appellant did not provide clear instruction to students through planning and implementation of a mastery level lesson (a lesson focused on student mastery of curriculum skills).
- She did not frame lessons to include the "Big Picture" for students.
- She did not provide clarity or explicitness in her lessons.
- She gave incorrect or insufficient information; did not correct student content errors.
- She did not use a variety of appropriate technology tools, such as ActiveInspire.

Standard III

- The Appellant did not use management strategies effectively to meet student needs.
- She wasted time by not appropriately pacing lessons, making awkward transitions or no transitions.

Standard IV

- The Appellant did not adapt instruction based on assessment information.
- She did not develop and/or communicate clear criteria for success for student work and did not use models, rubrics.

## Standard VI

- The Appellant demonstrated a lack of respect and professional courtesy to some members of the school community.
- She did not accept feedback in a respectful and thoughtful manner.

(Bd. Ex. A3-054-062.)

103. Ms. Schultze concluded that the Appellant's performance was Below Standard and recommended that she be dismissed from employment with MCPS. (Bd. Ex. A3-062.)

104. On May 28, 2015, the Appellant appeared before the PAR Panel to make a presentation. After review and discussion of the documentation and information presented by the Appellant and her school administrator on May 28, 2015, the PAR Panel notified the Appellant that it was recommending to the Superintendent of Schools that the Appellant's teaching contract with MCPS be terminated. (Bd. Ex. C-002.)

105. By letter dated June 9, 2015, Dr. Kimberly A. Statham, Deputy Superintendent, School Support and Improvement, MCPS, notified the Appellant that she was giving serious consideration to recommending the Appellant's dismissal for incompetency based on evidence of her Below Standard teaching performance as determined by the administration at RICA and other qualified professionals from MCPS. (Bd. Ex. D-001.)

106. On July 7, 2015, Ms. Statham, while serving as the designee for Larry Bowers, Interim Superintendent of Schools, MCPS, met with the Appellant and her attorney who apprised Ms. Statham of issues surrounding the Appellant's teaching performance that the Appellant wished to be taken into consideration. (Bd. Ex. D-002.)

107. By letter dated July 17, 2015, Superintendent Bowers advised the Appellant that based on the recommendation of the PAR Panel, Dr. Statham's recommendation, "in the context of the available documentation about [the Appellant's] teaching performance over the last three

years,” he was recommending to the County Board that the appellant’s employment be terminated on the ground of incompetency. (Bd. Ex. D-002.)

108. At the Appellant’s request, a hearing was held before a Hearing Examiner on October 23, 2015, November 5, 2015, and January 29, 2016.<sup>19</sup>

109. On December 18, 2015, the Appellant’s attorney emailed Danielle Clinton-Williams, Education Program Specialist, Division of Educator Effectiveness, MSDE, inquiring about generic special education certification. Ms. Clinton-Williams stated that “[t]o be eligible to teach Secondary English in Maryland, an individual must be certified in English 7-12. An individual certified in Generic Special Education Infant – 3/ 1-8/6 Adult, is eligible to provide special education services to students at the appropriate age/grad level.” (App. Ex. 33.) On December 18, 2015, she emailed the Appellant’s attorney that “[f]or clarity, if the classroom is an English Content Classroom, the educator should be certified [in] English 7-12.” (App. Ex. 33.)

110. On March 17, 2016, the Hearing Examiner issued a Decision recommending that the interim superintendent’s recommendation for dismissal be adopted by the County Board.

111. On May 10, 2016, the County Board adopted and affirmed the Hearing Examiner’s findings and recommendation and dismissed the Appellant from her position in MCPS.<sup>20</sup>

## **DISCUSSION**

### **General Legal Background**

Section 6-201 of the Educational Article provides that the county superintendent “shall . . . [s]uspend [teachers] for cause and recommend them for dismissal in accordance with § 6-202 of

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<sup>19</sup> Counsel for both parties made oral arguments before the Hearing Examiner on February 12, 2016.

<sup>20</sup> Pursuant to the Appellant’s request, oral argument was heard by the County Board on April 20, 2016.

this subtitle.” Md. Code Ann., Educ. § 6-201(b)(2)(iv) (2014).<sup>21</sup> Section 6-202 provides in pertinent part that “[o]n the recommendation of the county superintendent, a county board may suspend or dismiss a teacher . . . for . . . [i]ncompetency . . . .” *Id.* § 6-202(a)(1)(iv) (Supp. 2016).

Subsections (2) - (4) set forth the procedure for such removal, including notice; opportunity for a hearing before the county board, in person or by counsel, and to bring witnesses to the hearing; and the right to appeal the decision of the county board to the State Board. *Id.* § 6-202(a)(2)-(4). The county board may have the proceedings heard first by a hearing examiner, who, with certain exceptions not applicable here, must be an attorney admitted to practice law in Maryland. *Id.* § 6-203(a), (b) (2014).

Section 6-203 further provides in pertinent part:

- (c) The hearing examiner shall submit to the county board and appellant:
  - (1) A record of the proceedings and exhibits; and
  - (2) The hearing examiner’s findings of fact, conclusions of law, and recommendation.
- (d) Parties to the proceedings before the hearing examiner may make arguments before the county board.
- (e)(1) After it reviews the record and the recommendation of the hearing examiner, the county board shall make a decision.
  - (2) The decision may be appealed to the State Board as provided in this article.

*Id.* § 6-203(c)-(e).

Pursuant to COMAR 13A.01.05.03E(1), (2), when a decision is appealed to the State Board, the local board shall transmit the record of the local proceedings with its response to an appeal, including a transcript of the proceedings.

COMAR 13A.01.05.05F sets forth the standard of review in an appeal to the State Board:

F. Certificated Employee Suspension or Dismissal pursuant to Education Article, §6-202, Annotated Code of Maryland.

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<sup>21</sup> Unless otherwise indicated, all further section references are to the Education Article.

(1) The standard of review for certificated employee suspension and dismissal actions shall be de novo as defined in §F(2) of this regulation.

(2) 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.

(3) The local board has the burden of proof by a preponderance of the evidence.

(4) The State Board, in its discretion, may modify a penalty.

Pursuant to COMAR 13A.01.05.07A(2), the State Board shall transfer to the OAH an appeal of a certificated employee suspension or dismissal pursuant to section 6-202 of the Education Article. Subsections B, D, and E further provide in pertinent part as follows:

B. Transcripts.

(1) Except as provided in §B(2) of this regulation, in an appeal of a suspension or dismissal of a certificated employee, the entire record of the proceedings before the local board shall be prepared and transcribed at the expense of the local board and shall be made a part of the record of the proceedings.

(2) Both parties may agree by way of written stipulation to omit from the record and transcript portions not relevant for consideration by the State Board.<sup>22</sup>

....

D. Except as otherwise provided in this chapter, hearing procedures shall be in accordance with the Administrative Procedure Act, State Government Article, Title 10, Subtitle 2, Annotated Code of Maryland, and COMAR 28.02.

E. The administrative law judge shall submit in writing to the State Board a proposed decision containing findings of fact, conclusions of law, and recommendations, and distribute a copy of the written proposed decision to the parties.

In a 2015 Opinion, the State Board set forth the following criteria for dismissing a teacher on the ground of incompetency:

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<sup>22</sup> As discussed at length in my previous Ruling on Appellant's Request to Present Additional Material Testimony, subsection C relates to the introduction of additional testimony or documentary evidence. In this case, the parties ultimately presented argument only and did not present additional evidence.

The record must demonstrate that: 1) the evaluation process was fair and impartial; 2) the teacher had serious teaching deficiencies; and 3) the teacher was provided adequate assistance to remedy those deficiencies.

*Sammarco v. Bd. of Educ. of Prince George's Cty.*, MSBE Op. No. 15-01, at 5 (2015).

### **Parties' Contentions**

In this case, the Appellant contended that the Board improperly terminated her for incompetency based on an evaluation of her performance as a classroom teacher for subjects for which she (a) did not have subject matter certification as required by Maryland statutes and regulations; and/or (b) a designation as "Highly Qualified" as required by the NCLB.<sup>23</sup>

Thus, according to the Appellant, she is entitled to reinstatement to her position as a teacher with MCPS and back pay.

The County Board contended that it properly terminated the Appellant based on incompetency because she received multiple Below Standards ratings on Professional Growth System Standards for proficient teaching relating to deficiencies in pedagogy from several evaluators over a three year period. This was despite being provided intensive individualized assistance through MCPS's PAR program during the 2013-2014 and 2014-2015 school years.

The County Board contended that the Appellant was permitted to teach Grade 9 English and Grade 7 Social Studies to special education students without specific certifications in those subjects because she holds a certification in generic special education grades 1-8 and 6-12. According to the County Board, a teacher with such a generic special education certificate may teach any subject to special education students within the grade range of her certification, except art, music, and physical education. The County Board contended that, in any event, it was not a

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<sup>23</sup> In her appeal, the Appellant did not contest the underlying deficiencies in her teaching performance that were the bases of her termination as a MCPS teacher. I note also that the Appellant did not argue that she should have held certifications or the "Highly Qualified" designation for subjects taught by her in prior years. Rather, as set forth in her Appeal Request (and as clarified in her Memorandum Regarding "Highly Qualified"), her claims relate only to her assignment to teach the core subjects of English (Grade 9) and Social Studies (Grade 7) at RICA during the 2014-2015 school year.

concern for the PAR Panel that the Appellant was teaching content areas in which she did not have a separate certification.

Furthermore, according to the County Board, the Appellant's argument relating to her lack of a "Highly Qualified" designation under the NCLB must fail because (1) each teacher was responsible for obtaining the "Highly Qualified" designation through an easy-to-use application process or additional course work, and the Appellant failed to do so, and (2) pursuant to the provisions of the Education Article regarding teacher certification, teachers, including those instructing special education classes, may teach core subjects throughout the state, even without the "Highly Qualified" designation.

**PAR**

As noted above, the MCPS follows the Professional Growth System pursuant to which the following Performance Standards are applied in evaluations of teachers:

- I. Teachers are committed to students and their learning.
- II. Teachers know the subjects they teach and how to teach those subjects to students.
- III. Teachers are responsible for establishing and managing student learning in a positive learning environment.
- IV. Teachers continually assess student progress, analyze the results, and adapt instruction to improve student achievement.
- V. Teachers are committed to continuous improvement and professional development.
- VI. Teachers exhibit a high degree of professionalism.

(Bd. Ex. C-009, 064, 119; Grundy Testim. at 67; Dempsey Testim. at 482-83.)

The PAR Program is a mechanism for maintaining system-wide quality control and ensuring that all MCPS teachers meet MCPS standards of performance. A focus of the PAR program is to improve instruction by teachers who are judged to be "below standard." The PAR program is made up of two components: the PAR Panel, consisting of teachers and principals, and CTs who provide the under-performing teacher with intensive, individualized assistance.

## Certification

Section 6-101 of the Education Article provides that “[u]nless an individual is eligible to be issued a certificate by the State Superintendent, an individual may not be employed as a . . . teacher.” Md. Code Ann., Educ. § 6-101 (2014). Section 6-121(a) and (b) provide that the State Department of Education (MSDE) “shall establish teacher certification for career professionals in specialized fields” and “adopt regulations to implement [that] section. *Id.* § 6-121(a), (b).

With regard to teacher certification, COMAR 13A.12.01.01 provides:

### .01 Purpose of Licensure in Maryland.

Certification of professional education personnel by the State is established to offer assurance to the citizens of this State that:

- A. Professional public educational staff possess the minimum essential knowledge and skills needed to achieve outcomes for public education declared by the State Board of Education;
- B. The results of professional preparation and training are united with the instructional practices and outcomes expected for public education;
- C. Academically successful, multitalented, and experientially diverse individuals are being sought and retained by local school systems; and
- D. Certificated education personnel maintain competent practice through career long-engagement with their content area, research, best practice, and expert opinion.

COMAR 13A.12.01.05 sets forth the general requirements for professional certificates.

COMAR 13A.12.01.13 sets forth the requirements for adding new certification areas to a teacher’s professional certificate.

COMAR 13A.12.02.05A and B provide:

### .05. Certification in Middle School Education (Grades 4-9).

A. Middle school certification may be obtained in four content areas:

- (1) English/Language Arts;
- (2) Mathematics;

(3) Social Studies; or

(4) Science.

B. To receive middle school certification, the applicant shall:

(1) Complete one of the certification options set forth in COMAR 13A.12.01.04B, C, or E; and

(2) Meet the applicable testing requirements established by the State Superintendent of Schools pursuant to COMAR 13A.12.01.05A(3).

COMAR 13A.12.02.06 sets forth the requirements necessary to obtain a certification in general secondary content areas (grades 7-12), including English. Those requirements include, among other things, completion of a bachelor's or higher degree with a major in the certification area or completion of a certain number of semester hours in the certification area; completion of a certain number of semester hours of professional education course work at the appropriate age or grade level (including at least one three hour course in specified areas such as teaching methodology, assessment of students and six semester hours relating to reading);<sup>24</sup> and completion of a supervised experience or one year of satisfactory full-time teaching experience at the appropriate age or grade level and in the subject area for which the applicant is seeking certification.

COMAR 13A.12.02.13 sets forth the requirements for obtaining a certification in Social Studies (grades 7-12), which includes earning a bachelor's or higher degree with a major in Social Studies or completion of a certain number of semester hours of Social Studies content course work; and meeting the professional education course work required in subsection .06A(2). *See also* COMAR 13A.12.02.20 (requirements for obtaining a generic special education certificate).

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<sup>24</sup> Those hours may cover, among other things, such areas as use of reading assessment data to improve instruction, making instructional modifications and accommodations, teaching students to learn from the text by applying theories, strategies, and practices, processing multimedia information and strategies, and strategies for students to communicate effectively orally and in writing about what they have read in content area texts. COMAR 13A.12.02.06A(2)(b)(ii), (iv), (vi), (vii).

COMAR 13A.12.02.02A provides that “[e]ach teacher employed in the public school systems of Maryland shall hold a professional certificate in the teacher’s area of major assignment . . . .”

**NCLB**

During the relevant period in this case, the NCLB was in effect.<sup>25</sup> 20 U.S.C. §§ 6301 *et seq.* (2012 & Supp. II 2014). The purpose of the NCLB was to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments.” *Id.* § 6301 (Supp. II 2014).

The NCLB required that “each local educational agency receiving assistance under this part . . . shall ensure that all teachers . . . teaching in a program supported with funds under this part are highly qualified.” *Id.* § 6319(a)(1).

The Code of Federal Regulations in effect at the relevant time provided in pertinent as follows:

§ 200.55 Qualifications of teachers.

....

(b) *All teachers of core academic subjects.*

(1) Not later than the end of the 2005–2006 school year, each State that receives funds under subpart A of this part, and each LEA in that State, must ensure that all public elementary and secondary school teachers in the State who teach core academic subjects, including teachers employed by an LEA to provide services to eligible private school students under § 200.62, are highly qualified as defined in § 200.56.

(2) A teacher who does not teach a core academic subject—such as some vocational education teachers—is not required to meet the requirements in § 200.56.

(c) *Definition.* The term “core academic subjects” means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.

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<sup>25</sup> The No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425, was amended on December 10, 2015 by the Every Student Succeeds Act (ESSA), Pub. L. No. 114–95, 129 Stat. 1802 (codified in sections of 20 U.S.C.). ESSA reauthorized the Elementary and Secondary Education Act of 1965, Pub. L. No. 89–10, 79 Stat. 27, the federal government’s education law.

34 C.F.R. § 200.55(b), (c) (2015).

§ 200.56 Definition of “highly qualified teacher.”<sup>26</sup>

A teacher described in § 200.55(a) and (b)(1) is a “highly qualified teacher” if the teacher meets the requirements in paragraph (a) and paragraph (b), (c), or (d) of this section.

(a) *In general.*

(1) Except as provided in paragraph (a)(3) of this section, a teacher covered under § 200.55 must—

(i) Have obtained full State certification as a teacher, which may include certification obtained through alternative routes to certification; or

(ii)(A) Have passed the State teacher licensing examination; and

(B) Hold a license to teach in the State.

(2) A teacher meets the requirement in paragraph (a)(1) of this section if the teacher—

(i) Has fulfilled the State's certification and licensure requirements applicable to the years of experience the teacher possesses; or

(ii) Is participating in an alternative route to certification program under which—

(c) *Teachers not new to the profession.* A teacher covered under § 200.55 who is not new to the profession also must—

(1) Hold at least a bachelor's degree; and

(2)(i) Meet the applicable requirements in paragraph (b)(2) or (3) [relating to teachers new to the profession] of this section; or

(ii) Based on a high, objective, uniform State standard of evaluation in accordance with section 9101(23)(C)(ii) of the [Elementary and Secondary

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<sup>26</sup> COMAR 13A.01.04.02B(10) defines “[h]ighly qualified teacher” as “a teacher with qualifications consistent with the requirements specified in the No Child Left Behind Act 20 U.S.C. § 6301 et seq., and as implemented by the Department.”

Education Act (ESEA)],<sup>27</sup> demonstrate competency in each academic subject in which the teacher teaches.

**(d) A special education teacher is a “highly qualified teacher” under the Act if the teacher meets the requirements for a “highly qualified special education teacher” in 34 CFR 300.18.**

*Id.* § 200.56(a)(1), (2), (c), (d) (emphasis added).

§ 300.18 Highly qualified special education teachers.

(a) *Requirements for special education teachers teaching core academic subjects.* For any public elementary or secondary school special education teacher teaching core academic subjects, the term highly qualified has the meaning given the term in section 9101 of the ESEA and 34 CFR 200.56, except that the requirements for highly qualified also—

(1) Include the requirements described in paragraph (b) of this section; and

(2) Include the option for teachers to meet the requirements of section 9101 of the ESEA by meeting the requirements of paragraphs (c) and (d) of this section.

(b) *Requirements for special education teachers in general.*

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<sup>27</sup> See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 9101(23), 115 Stat. 1425, 1959-60 (codified originally at 20 U.S.C. § 7801), which defined “Highly Qualified” as follows:

The term “highly qualified” –

(A) when used with respect to any public elementary school or secondary school teacher teaching in a State, means that –

(i) the teacher has obtained full State certification as a teacher (including certification obtained through alternative routes to certification) or passed the State teacher licensing examination, and holds a license to teach in such State. . . and

(ii) the teacher has not had certification or licensure requirements waived on an emergency, temporary, or provisional basis . . .

(C) when used with respect to an elementary, middle, or secondary school teacher who is not new to the profession, means that the teacher holds at least a bachelor’s degree and –

(i) has met the applicable standard in clause (i) or (ii) of subparagraph (B) [relating to teachers new to the profession], which includes an option for a test; or

(ii) demonstrates competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation that –

(I) is set by the State for both grade appropriate academic subject matter knowledge and teaching skills;

(II) is aligned with challenging State academic content and student academic achievement standards and developed in consultation with core content specialists, teachers, principals, and school administrators;

(III) provides objective, coherent information about the teacher’s attainment of core content knowledge in the academic subjects in which a teacher teaches;

(IV) is applied uniformly to all teachers in the same academic subject and the same grade level throughout the State;

(V) takes into consideration, but not be based primarily on, the time the teacher has been teaching in the academic subject;

(VI) is made available to the public upon request; and

(VII) may involve multiple, objective measures of teacher competency.

(1) When used with respect to any public elementary school or secondary school special education teacher teaching in a State, highly qualified requires that—

(i) The teacher has obtained full State certification as a special education teacher (including certification obtained through alternative routes to certification), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except that when used with respect to any teacher teaching in a public charter school, highly qualified means that the teacher meets the certification or licensing requirements, if any, set forth in the State's public charter school law;

(ii) The teacher has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) The teacher holds at least a bachelor's degree.

(2) A teacher will be considered to meet the standard in paragraph (b)(1)(i) of this section if that teacher is participating in an alternative route to special education certification program . . .

....

(c) *Requirements for special education teachers teaching to alternate academic achievement standards.* When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate academic achievement standards established under 34 CFR 200.1(d), highly qualified means the teacher, whether new or not new to the profession, may either—

(1) Meet the applicable requirements of section 9101 of the ESEA and 34 CFR 200.56 for any elementary, middle, or secondary school teacher who is new or not new to the profession; or

(2) Meet the requirements of paragraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher, or, in the case of instruction above the elementary level, meet the requirements of paragraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher and have subject matter knowledge appropriate to the level of instruction being provided and needed to effectively teach to those alternate academic achievement standards, as determined by the State.

(d) *Requirements for special education teachers teaching multiple subjects.* Subject to paragraph (e) of this section, when used with respect to a special education teacher who teaches two or more core academic subjects exclusively to children with disabilities, highly qualified means that the teacher may either—

(1) Meet the applicable requirements of section 9101 of the ESEA and 34 CFR 200.56(b) or (c);

(2) In the case of a teacher who is not new to the profession, demonstrate competence in all the core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher who is not new to the profession under 34 CFR 200.56(c) which may include a single, high objective uniform State standard of evaluation (HOUSSE) covering multiple subjects; or . . .

(e) *Separate HOUSSE standards for special education teachers.* Provided that any adaptations of the State's HOUSSE would not establish a lower standard for the content knowledge requirements for special education teachers and meet all the requirements for a HOUSSE for regular education teachers—

(1) A State may develop a separate HOUSSE for special education teachers; and

(2) The standards described in paragraph (e)(1) of this section may include single HOUSSE evaluations that cover multiple subjects.<sup>28</sup>

*Id.* § 300.18(a), (b)(1), (2), (c), (d)(1), (2), (e).

### *Analysis*

It was undisputed that the Appellant taught Grade 9 English and Grade 7 Social Studies to special education students during the 2014-2015 school year at RICA,<sup>29</sup> that those are core subjects, and that the Appellant did not hold a certification in either subject. It was also undisputed that the Appellant did not have a “Highly Qualified” designation in those subjects under the NCLB.

### *Certification in generic special education*

Marie Bercaw, Certificate Coordinator for the MCPS, testified that her duties include serving as the school system liaison to the MSDE for all of MCPS’s certificated teachers and other employees required to hold a state certificate for their position. Her unit “takes care of all of those employees, ensuring that they are appropriately certified.” (Bercaw Testim. at 23.)

According to Ms. Bercaw, the Appellant’s generic special education certificate permitted the

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<sup>28</sup> I note that the Appellant also relied upon the text of pages from the MSDE’s website defining a “highly qualified” teacher and indicating that a special education teacher who is the teacher of record, must meet federal “highly qualified” standards to teach core academic subjects. No foundation was laid, however, that the information in those printouts relating to the NCLB constituted an MSDE policy or directive.

<sup>29</sup> See section 6-201 of the Education Article, which provides:

**§ 6-201. Appointment, tenure, and qualifications.**

(a)(1) Subject to paragraph (2) of this subsection, the county board shall employ individuals in the positions that the county board considers necessary for the operation of the public schools in the county.

.....

(b)(1) Except as provided in subsection (a) of this section, the county superintendent shall nominate for appointment by the county board: . . .

(ii) All principals, teachers, and other certificated personnel.

(2) As to these personnel, the county superintendent shall:

(i) Assign them to their positions in the schools;

(ii) Transfer them as the needs of the schools require . . . .

Md. Code Ann., Educ. § 6-201(a)(1), (b)(1)(ii), (2)(i)-(ii) (2014).

Appellant to teach any subject to special education students (except art, music, and physical education) “because she’s teaching special education students. That’s the most important piece, is to have the preparation to teach that population of students, and that she did have.” (Bercaw Testim. at 372.)

Michelle Schultze, Principal, RICA, testified that someone with a special education certification can teach special education students many different content areas. “[I]f you’re a special educator, you’re working in a special education school, you really have to be prepared to go into any content area.” (Schultze Testim. at 326-27.) She likened that circumstance to “elementary school teachers that teach whole math, science, and social studies curriculum to all those grade levels.<sup>30</sup> It’s similar in preparation. They’re prepared to teach that group of students all the different content areas.” (Bercaw Testim. at 373.) When asked about a November 14, 2014 email sent by her to the Appellant stating that the Appellant was “not certified in general education English or designated [Highly Qualified] to teach special education students which would be ‘spec ed English’ in the database,” and that the Appellant was “only certified in special education and Admin 1,” Ms. Bercaw testified that she meant that the Appellant did not hold English certification by itself to teach either middle school or high school.”<sup>31</sup> (Bercaw Testim. at 362-63.)

Lance Dempsey, Principal at Northwest High School, testified that “you always like it when [special education teachers] have a concentration in a certain area, but it’s just like with elementary when you’re certified as 1 through 8, you may not have a concentration in a particular subject area. Same thing with special [education].” (Dempsey Testim. at 515.)

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<sup>30</sup> According to the County Board, elementary school teachers can teach core subjects even if they do not hold a certification in that subject.

<sup>31</sup> Ms. Bercaw clarified that there is no special education English certification. (Bercaw Testim. at 363.)

According to the Appellant, because she was not certified to teach English and Social Studies, she struggled to digest the substance of the course material while delivering it pedagogically. She testified that she did not know the subjects she was teaching or how to teach them to students. She testified that not knowing the subject matter “bleeds into your lesson plan” and that she did not consider herself to be performing proficiently because she did not know the content material. (App. Testim. at 667.) “I was starting off below standard because I didn’t know the content material, so I was just an on-the-job trainee teacher learning the content material . . . and the lesson plans, how to plan it, as well as with the students and how to plan lessons that are engaging, but I didn’t understand the content, so how would I plan lesson plans to engage them.” (App. Testim. at 673-74.)

When asked how knowledge of content affects actual pedagogy, actual teaching, the Appellant answered: “If you understand the knowledge of the content of the material and you . . . are able to digest the material, then you are able to teach it in a manner that the students are able to understand and obtain and you’re able to access the curriculum in a correct way.” (App. Testim. at 674.) When asked how lesson planning was impacted, the Appellant answered: “Just numerous nights and days up planning a lesson after you’re evaluating what you’re doing and then trying to learn the subject, the next topic; and just reevaluating and trying to make sure that your students are understanding. So sometimes the lesson planning may not have been geared or planned in the correct manner toward the topic.” (App. Testim. at 675.)

The Appellant testified about the difficulties she had, in particular, teaching Shakespearean English. She did not understand downloaded lesson plans because she “didn’t have the training [and] didn’t take the courses in college.” (App. Testim. at 680.) “You can give me the lessons, but if I don’t understand the material, it does not help. If I don’t have the vocabulary, if I don’t have the background knowledge, if I didn’t take any courses in

Shakespearean English, I had to go online and teach myself.” (App. Testim. at 679-80.)

Furthermore, because she did not understand the Social Studies vocabulary and vernacular, she could not understand lesson plans. According to the Appellant, Nakia Sutton. MCPS CT (the 2014-2015 CT), did not help her develop a lesson plan; she just reviewed the Appellant’s first lesson plan with some feedback.

For the following reasons, I find that the regulations applicable to certification did not require that the Appellant in this case be certified in English and Social Studies in order to teach those subjects to special education students during the 2014-2015 school year.<sup>32</sup>

On the one hand, COMAR 13A.12.02.20, relating to certification in special education, does not contain language specifically requiring certification in specific content areas.<sup>33</sup>

On the other hand, COMAR 13A.12.02.18 and .20 do not state that teachers holding a generic special education certificate may teach any special education student any core subject within the grade range of her certification. Furthermore, COMAR 13A.12.02.02A, B(1) provides that “[e]ach teacher employed in the public school systems of Maryland shall hold a professional certificate in the teacher’s area of major assignment . . . **[and] should not be assigned to teach more than two classes outside the teacher’s area of certification.**” (emphasis added).

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<sup>32</sup> I note that much was made by the Appellant about the following email exchange: On December 18, 2015, in response to an email from the Appellant’s attorney, Danielle Clinton Williams, Education Program Specialist, Division of Educator Effectiveness, MSDE emailed the attorney as follows:

To be eligible to teach Secondary English in Maryland, an individual must be certified in English 7-12. An individual certified in Generic Special Education Infant – 3/ 1-8 / 6 Adult, is eligible to provide special education services to students at the appropriate age/grade level.

(App. Ex. 33.)

On that same date, the attorney asked for clarification of “the statement that an individual ‘is eligible to provide special education services to students at the appropriate grade level,’” (App. Ex. 33), to which Ms. Clinton-Williams responded, “For clarity, if the classroom is an English Content Classroom, the educator should be certified in English 7-12.” (App. Ex. 33.)

I found Ms. Clinton-Williams emails vague. In any event, it is my role to apply the law to the facts in this case.

<sup>33</sup> This is similar to COMAR 13A.12.02.04 relating to certification in elementary education. Comparatively, COMAR 13A.12.02.05A provides that “[m]iddle school certification may be obtained in four content areas: (1) English/Language Arts; (2) Mathematics; (3) Social Studies; or (4) Science.

In any event, I find that COMAR 13A.12.02.02 applies to the facts in this case. At first glance, that regulation may appear to support the Appellant's position that she should not have been assigned to teach three periods of Grade 9 English and two periods of Grade 7 Social Studies at RICA, without specific certifications in those subjects. Further reading of that regulation indicates, however, that she could be so assigned for the year she was at RICA. That regulation provides:

.02. Assignment.

A. Certificate Required for Major Assignment. Each teacher employed in the public school systems of Maryland shall hold a professional certificate in the teacher's area of major assignment.

B. Assignment to More Than Two Classes Outside Area of Certification.

(1) A teacher should not be assigned to teach more than two classes outside the teacher's area of certification.

(2) If a local school system finds it necessary to assign a teacher to teach more than two classes outside the teacher's area of certification, the teacher shall retain the professional certificate.

**(3) For each consecutive year after the first year that a teacher is assigned to teach more than two classes outside the teacher's area of certification, the teacher shall earn at least 6 semester hours per year toward certification in the out-of-area assignment before continuing the assignment.**

(Emphasis added.)

Thus, I find that the MCPS could assign the Appellant to teach more than two English and/or Social Studies classes outside her generic special education certification during the 2014-2015 school year at RICA. To be able to continue to teach those subjects the next year, the Appellant would have been required to earn at least six semester hours per year toward certification in those subjects; however, because she was terminated after the first year she was assigned to teach those classes, it became a non-issue.

Nonetheless, as discussed below, although I have found that the Appellant was not required to be certified in English and Social Studies, I find that her lack of certification in those subjects, along with its accompanying education and experience, are a factor in determining

whether the County Board fairly evaluated her performance and complied with the purpose of the PAR program with regard to at least one Standard.

NCLB

Ms. Bercaw testified that a “Highly Qualified” designation was not required for the Appellant to be able to teach English or Social Studies to special education students. According to Ms. Bercaw, because the Appellant was a special educator working in a special education center, she was appropriately certified to teach any subject to those students, “so the [Highly Qualified] is an ancillary” that was required by the NCLB. According to Ms. Bercaw, from the perspective of qualification by the State of Maryland, the Appellant’s general generic education certification was sufficient for her to teach English 9 and Social Studies 7. However, when asked on cross-examination if it was required that the Appellant be designated as “Highly Qualified” to teach the courses that she was teaching, Ms. Bercaw acknowledged that “federal mandate requires it.” I find incongruous her subsequent testimony that because there is no penalty for a failure to comply,<sup>34</sup> a “Highly Qualified” designation was “[n]ot required,” but rather, “[d]esired.” (Bercaw Testim. at 364, 367.)

Ms. Bercaw testified that in order to determine if the Appellant met the “Highly Qualified” designation, she would have to examine the Appellant’s records, e.g., review the Appellant’s undergraduate transcript and other matters to see if she had content in English or Social Studies to use in applying the HOUSSE. (Bercaw Testim. at 369-70.) There was no evidence that the Certification Unit ever did this before the Appellant was assigned to teach English and Social Studies at RICA. Ms. Bercaw testified that her unit “only really look[s] at something if it’s . . . more obvious, like if you’ve got a teacher slated to teach an entire day out of their certification area or most of their day.” (Bercaw Testim. at 34.)

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<sup>34</sup> Ms. Bercaw testified that the “Highly Qualified” designation is “certainly something that we work toward, but it’s really desired, because there’s no penalty if a person doesn’t have it.” (Bercaw Testim. at 364.)

The County Board did not cite legal authority for its proposition that the “Highly Qualified” designation was not required by the NCLB. Moreover, my review of the Maryland law relating to teacher certification, the NCLB, and applicable regulations, revealed no supporting authority for that assertion.

In any event, the underlying issue in this case is whether a necessary part of the first element set forth in *Sammarco* was met, i.e., that the evaluation process was fair. *Sammarco*, MSBE Op. No. 15-01, at 5. Although the County Board failed to comply with the NCLB, I cannot find that the lack of a Highly Qualified designation, or for that matter, subject matter certification, meant that the Appellant was per se assigned to a teaching position that she could not possibly competently teach. I find that the lack of certification and the “Highly Qualified” designation were of evidentiary value with regard to the issue of fairness, however, and, thus, factors to be considered.

### *Fairness*

#### Standard II (Teachers know the subjects they teach and how to teach those subjects to students)

The Appellant’s testimony established that MCPS assigned an already struggling teacher, who was going through the PAR process, to teach several courses in subjects about which she had little knowledge.

The County Board would put the onus on the Appellant to initiate and pursue the process of proving that she was “Highly Qualified” to teach those core subjects under the NCLB.<sup>35</sup> It asserted that each teacher was responsible for obtaining the “Highly Qualified” designation through an easy-to-use application process or additional course work and that there is no evidence in this case that the Appellant applied for that designation. Ms. Dempsey

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<sup>35</sup> The Appellant and County Board witnesses testified regarding the State’s HOUSSE standards as an avenue to that designation. The Appellant’s post hearing submission, which addresses the HOUSSE, indicates that “the availability of HOUSSE will expire at the conclusion of the 2013-2014 school year,” but at no time did the parties indicate that the HOUSSE was not in effect at the relevant time. (App. Ex. 37.)

indicated that with regard to Northwest High School, “it definitely helps if [a special education teacher] feel[s] familiar with the content area, but there are times when people may not have certification in that particular content area but they have an interest, and we give them the opportunity to know the curriculum ahead of time. So if we’re hiring someone over the summer, we give them all the information that they need so they start boning up on the information.” (Dempsey Testim. at 516-17.)

Based on the Appellant’s testimony, I find that MCPS’ assistance to the Appellant in becoming adequately versed in English and Social Studies prior to the beginning of the 2014-2015 school was spotty, at best. Furthermore, I find that it was unrealistic for the County Board to expect her to become proficient in two core subjects, with all that entailed, prior to the beginning of the 2014-2015 school year, particularly without significant assistance from the County Board. She received some assistance after she started, but I find that it was unfair to expect her to learn two new subjects at the same time she was being evaluated under PAR with regard to her knowledge of those subjects and how to teach them.

Furthermore, the Appellant expressed her concerns about her lack of certification in those subjects early in the school year. She testified that when she began at RICA, she told Ms. Schultze that she was not familiar with the subject matter of English 9. She told her again on November 7, 2014 that she was not certified to teach English or Social Studies and that she did not have sufficient content knowledge in Social Studies. She sought out help and/or requested training numerous times with regard to teaching those subjects.

Ms. Sutton testified that the Appellant was very clear with her that she did not have experience teaching English, so Ms. Sutton “wanted to make sure that [she] gave her supports that she may not be familiar with,” such as breaking down for her the brainstorming piece of the writing process, the revising and editing stage. (Sutton Testim. at 136-37.) I fail to see how

those supports would have enabled the Appellant to adequately teach those subjects, however, without a basic working knowledge of the subject content.

Furthermore, based on the description of the Appellant's prior positions, as a TST and resource room support, it is clear that not only the subjects, but the methods for teaching them were new to the Appellant. Indeed, Ms. Dempsey acknowledged in her testimony that "what the [TST] does is very different than what a special education teacher does[.]" (Dempsey Testim. at 489.)

The County Board asserted that the Appellant was terminated for reasons based solely on deficiencies in pedagogy unrelated to subject matter. Robert Grundy testified that his responsibilities as Director of Performance Evaluation, Office of Human Resources, includes coordinating closely with the PAR evaluation process. He testified that the six performance standards "look at kind of the active pedagogy, so what's involved in teaching. So they are generic." (Grundy Testim. at 46-47.) When asked if good pedagogy has to do with something other than the specific content, however, Mr. Grundy acknowledged that "[i]ts related to it. Standard II talks about knowledge of your subject and how to teach it[.]"<sup>36</sup> (Grundy Testim. at 47-48.) When asked how you would glean whether or not the teacher knew the subject they were teaching, he answered, "Through their delivery of it." (Grundy Testim. at 69.)

When asked about certification requirements, Mr. Grundy deferred to Ms. Bercaw, but testified that if a teacher was teaching in a special education setting, their generic special education certification would be sufficient to enable them to teach English. When given an example on cross-examination relating to the subject of Physics, however, Mr. Grundy acknowledged that a high school teacher in a non-special education setting who did not have a

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<sup>36</sup> Mr. Grundy further testified that even a teacher with knowledge of a subject may not be good at teaching it. "You could be the best mathematician in the world, but unless you know how to run a good classroom environment that supports kids, unless you're committed to students' learning, unless you know how to assess student learning and use what you learn to adapt your teaching you can't be a good teacher." (Grundy Testim. at 47-48.)

certification in science, would not be competent to teach Physics. He acknowledged that children in special education are just as important as the rest of the children and that a lack of training in Physics would be an impediment to teaching that subject to special education students. With regard to English, he further acknowledged that “[a] child in special education has the same right to English content as a child who is not in special education.” (Grundy Testim. at 74.)

I find in light of the Appellant’s lack of knowledge and experience teaching the core subjects of English and Social Studies, her assignment to teach those subjects at the seventh and ninth grade levels to special education students was counter to the purpose of the PAR program, i.e., “to assist all teachers to meet standards for proficient teaching.”<sup>37</sup> (Bd. Ex. C-021, 076, 131.) Rather, the assignment to teach subjects in which she had little or no educational background set the Appellant up to fail an evaluation under Standard II (Teachers know the subjects they teach and how to teach those subjects to students).

For the reasons discussed below, however, I do not reach that same conclusion with regard to the entirety of her evaluation under the other Standards and, therefore, uphold the termination.

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<sup>37</sup> I note that the Individuals with Disabilities Education Act (IDEA) provides that all states that receive federal funds for education provide each child, who has a disability, with a free and appropriate public education (FAPE). 20 U.S.C. §§ 1400 *et seq.* (2012 & Supp. II 2014). 34 C.F.R. § 300.1 (2015) provides:

**§ 300.1 Purposes.**

The purposes of this part are—

- (a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
- (b) To ensure that the rights of children with disabilities and their parents are protected;
- (c) To assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and
- (d) To assess and ensure the effectiveness of efforts to educate children with disabilities.

*See also* Md. Code Ann., Educ. §§ 8-401 *et seq.* (2014 & Supp. 2016).

Standard I (Teachers are committed to students and their learning); Standard III (Teachers are responsible for establishing and managing student learning in a positive learning environment); Standard IV (Teachers continually assess student progress, analyze the results, and adapt instruction to improve student achievement); Standard VI (Teachers exhibit a high degree of professionalism)

At the end of the 2013-2014 school year, Ms. Fersch-Burn reported in her Final Summative Report, in addition to deficiencies relating to Standard II, the following deficiencies relating to Standards I, III, IV, and VI:

- Standard I (Teachers are committed to students and their learning): the Appellant missed opportunities to include equitable practices into instruction. She did not consistently use strategies so that all students received equitable opportunities for learning and their learning was maximized.
- Standard III (Teachers are responsible for establishing and managing student learning in a positive learning environment): the Appellant did not maintain a positive classroom environment. She had mixed success in addressing disruptive behavior and missed the opportunity to explain her expectations. She was not consistently well-provisioned for classroom instruction.
- Standard IV (Teachers continually assess student progress, analyze the results, and adapt instruction to improve student achievement.): the Appellant did not provide clear criteria for success and was inconsistent in assessing students' comprehension of material throughout all components of the lesson. She told students to take on hand-outs but did not state if they would be graded on those handouts. She did not monitor the students' grasp of new material.
- Standard VI (Teachers exhibit a high degree of professionalism): the Appellant lacked professionalism in interactions with the staff. She still did not attend all meetings, was defensive when critiqued, and accused her superiors/coworkers of bias.

Ms. Fersch-Burns emphasized that the Growth Plan developed for the Appellant at the end of the 2013-2014 school year was not designed for the teaching of specific subjects. Indeed, at the time it was developed, Ms. Fersch-Burns and the Appellant were not aware of what subject(s) the Appellant would be teaching the next school year. Rather, the goals were based on areas of need as gleaned from the data collected. Ms. Fersch-Burns testified that the objectives in the growth plan developed by her “move across schools because it is about positive classroom environment, interacting professionally with a [CT]. So that would be something that could

carry across schools.” (Fersch-Burns Testim. at 459.) According to Ms. Fersch-Burns, “a lot of these practices are not dependent upon the content of the teaching.” (Fersch-Burns Testim. at 459.)

That the Appellant had enduring issues regarding the aforementioned Standards was evident in Ms. Sutton’s and/or Ms. Schultze’s final reports at the end of the 2014-2015 school year.

In her Final Summative Report, dated April 29, 2015, Ms. Sutton found the Appellant deficient with regard to Standards III and IV as follows:<sup>38</sup>

- Standard III: the Appellant had mixed success in addressing disruptions and off task behaviors, and at times missed the opportunity to explain her expectations.
- Standard III: she did not consistently monitor the pace of the lesson. A warm-up took up half of a class period; she did not allow adequate time for students to complete a fully developed written response to a writing task. As a result, students did not consistently have sufficient time for independent practice or a lesson summarizer.
- Standard IV: she inconsistently provided feedback to her students on their overall class grades. She did not follow through with explanations for expressions of pride in the students. She did not provide students with progress reports, reference missing assignments, or offer students opportunities to be reassessed. She did not conference with students to provide feedback on their written responses or any other activity or assessment and did not hand back papers to students with grades or written feedback.
- Standard IV: she inconsistently communicated the criteria for success. She read a poem without reading the writing prompt to the students and did not provide them with her

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<sup>38</sup> I find that similar to the evaluation under Standard II, some of Ms. Sutton’s observations relating to Standards III and V were somewhat connected to the Appellant’s lack of knowledge of the subject and how to teach it and thus not fairly considered. For example, with regard to Standard III, Ms. Sutton found that the Appellant did not consistently communicate the lesson objective and agenda, missed an opportunity to explain to students how they are expected to achieve mastery, and did not elaborate on how students should be completing each activity when they displayed confusion. In addition, Ms. Sutton found that the Appellant did not consistently demonstrate high expectations for student work by holding them accountable for justifying their written and verbal responses. She rarely asked students to explain or justify their responses when summarizing lessons and missed opportunities for follow up questions that directly connected to the objective. She missed an opportunity to support students in unlocking a prompt and determining how to approach a writing task. With regard to Standard V, Ms. Sutton found that the Appellant had mixed success in checking for understanding. Questions used by the Appellant to check for understanding did not always connect to the lesson objective. She did not give a clear understanding of what she wanted students to gain or learn from the lesson. In one observed class, students were not asked to explain the lesson objective.

expectations for organizing and supporting their answers. She did not provide a writing rubric or any other form of guidelines to set expectations for student work. She did not explain to students how their work would be graded or if assignments would be counted as formative or summative assessments, and did not state point values and breakdowns of those points. She missed an opportunity to read and explain guidelines relating to the use of an acronym to the students.

With regard to the Appellant's performance at RICA, Ms. Sutton testified that when she had the Appellant peer visit another seventh grade English teacher in October 2013, "it wasn't about content. It was about just best practices." (Sutton Testim. at 148.) Ms. Sutton testified that the confusion she observed in students was "[u]sually . . . more about procedure more so than content. . . . It was more so about where are we writing this, where do we put this, how are we labeling this, what page are we on, things of that nature, things the teacher would tell the students prior to the lesson or throughout the activity." (Sutton Testim. at 208.)

In her May 18, 2015 Final Evaluation Report, Ms. Schultze found the Appellant deficient with regard to Standards I, III, IV and VI, in pertinent part, as follows:

- Standard I: the Appellant did not use instructional strategies that resulted in measurable academic growth and achievement. She used equitable classroom practices that reflect high standards for all students with mixed results. She lost track of what a student was writing on the board. She assigned the part of Romeo to one student then gave it to another. The assignment of parts to read appeared to be done spontaneously, without prior preparation. She broke students into cooperative groups with no apparent prior preparation or thought. One student was allowed to dominate his group.
- Standard III: the Appellant missed opportunities to use management strategies to meet student needs. She wasted learning time by not appropriately pacing lessons. Problem behavior continually went unnoticed and addressed. Therefore, students were often distracted and off-task, limiting their time for learning.
- Standard IV: the Appellant missed opportunities to adapt instruction based on assessment information. She explained that the students did not meet mastery of one of the objectives, but still assigned a BCR knowing students did not have the comprehension to answer. She planned activities for coverage, not for instruction.
- Standard VI: the Appellant demonstrated a lack of respect or professional courtesy to some members of the school community. She was reported to have called a para-educator a "snitch." She missed a meeting in the school office even though she was still in the school. She did not accept feedback in a respectful and thoughtful manner.

She was defensive and argumentative during the discussion in a post observation conference and she had to be reminded to meet professional obligations in a timely manner. As a result, the Appellant has struggled with accepting and applying feedback to her practice and meeting professional obligations.

In addition, Ms. Schultze testified that when she observed an English class taught by the Appellant on November 7, 2014, the instructional flow was erratic (with the Appellant sometimes stopping the class unnecessarily), and the Appellant “was hopping around, skipping around to different things.” (Schultze Testim. at 272.) When the Appellant taught English on April 23, 2015, she did not appear to know how to turn on ActiveInspire and there was confusion about where they were in the text.

After so many years of teaching, many of these tasks should have been rote for the Appellant. Furthermore, many of the performance issues began before she was assigned to teach English and Social Studies, and simply continued through that transition, and/or continued throughout the 2014-2015 school year (e.g., not addressing disruptive and off-task behaviors; not pacing her instruction; not providing feedback, explanations and instructions; and engaging in unprofessional behavior). It is perplexing and unfortunate that after so many years of teaching, the Appellant’s performance was sub-par, but the evidence was clear that it was.

### *Sammarco*

As set forth above, the *Sammarco* decision guides my review of the Appellant’s appeal. First, I conclude the record demonstrates that the evaluation process with regard to Standard II, and some parts of Standards III and V, was not fair. (There was no evidence that it was not impartial.) The remainder of the evaluation was fair and impartial, however. There was no concrete evidence to show why any of the MCPS staff who evaluated the Appellant would have any motivation for their opinions other than doing their jobs. In addition, numerous individuals conducted observations and evaluations, with similar findings and conclusions.

The record indicates that the evaluations of the Appellant's performance complied with the minimum requirements for evaluation of professionally certificated personnel, set forth in COMAR 13A.07.04.02. In addition, the evidence indicates that the County Board complied with the PAR requirements. (Bd. Ex. C-003-168.) *See also* Findings of Fact 23-25.

Second, for the reasons discussed above, I find that the record clearly supports the conclusion that the Appellant had serious teaching deficiencies.

Third, I find that the Appellant was provided adequate remedies to correct those deficiencies. In 2013-2014, the Appellant received a Continuous Improvement Plan and school personnel met with her and observed her in an effort to improve her performance. In the 2013-2014 and 2014-2015 school years, the Appellant was placed in the PAR program. As part of the PAR program, two CTs worked with the Appellant to improve her performance. In addition, the Appellant received assistance from multiple other MCPS personnel.

#### **CONCLUSION OF LAW**

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the County Board properly terminated the Appellant for incompetency. The County Board's evaluation of the Appellant's performance under Standard II of the Professional Growth System Standards was not fair because it was based on an evaluation of her performance as a classroom teacher for core subjects she was not qualified to teach, as evidenced in part by her lack of subject matter certification and lack of a "Highly Qualified" designation under the NCLB in those subjects; however, it properly terminated the Appellant for incompetency based on her performance under Standards I, III, IV and VI . 20 U.S.C. §§ 6301, 6319(a)(1) (Supp. II 2014); 34 C.F.R. §§ 200.55(b), (c), 200.56(a)(1),(2), (c), (d), 300.18(a), (b)(1), (2), (c), (d)(1), (2), (e) (2015); Md. Code Ann., Educ. §§ 6-201(b)(2)(iv), 6-202(a)(1)(iv) (2014 & Supp. 2016); COMAR

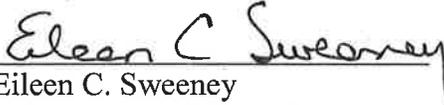
13A.01.05.05F(1)-(3); COMAR 13A.07.04.02; COMAR 13A.12.01.01; *Sammarco v. Bd. of Educ. of Prince George's Cty.*, MSBE Op. No. 15-01, at 5 (2015).

Thus, the Appellant is not entitled to reinstatement to her position and back pay.

**PROPOSED ORDER**

I **PROPOSE** that the decision of the Board of Education of Montgomery County terminating the Appellant for incompetency be **UPHELD**.

January 11, 2017  
Date Decision Issued

  
Eileen C. Sweeney  
Administrative Law Judge

ECS/emh  
#164755

**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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**YVETTE FINLAY-GAINES**

**v.**

**MONTGOMERY COUNTY BOARD OF  
EDUCATION**

**\* BEFORE EILEEN C. SWEENEY  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: MSDE-BE-01-16-18505**

**\* \* \* \* \***

**APPENDIX**

I admitted the following exhibits on the Board's behalf:

Bd. Ex. A pages A1-001 - 057	Evaluations, Observations, and Related Documents 2012/2013 School Year at Northwest High School
pages A2-001 - 021	Evaluations, Observations, and Related Documents 2013/2014 School Year at Northwest High School
pages A3-001 - 064	Evaluations, Observations, and Related Documents 2014/2015 School Year at RICA
Bd. Ex. B pages B1-001 – 030	Working Relationships and Professionalism, 2012/2013 and 2013/2014
pages B2-001 – 037	Working Relationships and Professionalism, 2014/2015 <sup>1</sup>
Bd. Ex. C pages C-001 – 168	PAR Panel Communication and PAR Documents
Bd. Ex. D pages D-001 – 021	Superintendent Recommendation and BOE Hearing Communications

I admitted the following exhibits on behalf of the Appellant:

App. Ex. 1 - Teacher Assignment, June 13, 2012

App. Ex. 2 - Professional Growth System Observation Conference Report, February 21, 2013

App. Ex. 3 - Post-Observation Conference Report, March 1, 2013

App. Ex. 4 - Post-Observation Conference Report, May 29, 2013

App. Ex. 5 - Letter from the Peer Assistance and Review Program to the Appellant, May 29, 2013

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<sup>1</sup> This exhibit included some pages that did not show Bates numbers.

- App. Ex. 6 - Letter from the Peer Assistance and Review Program to the Appellant, June 6, 2013
- App. Ex. 7 - Memo from Robert Grundy to Gina Ripoli, September 12, 2013
- App. Ex. 8 - Letter from Lance Dempsey to the Appellant, September 13, 2013
- App. Ex. 9 - Letter from the MCPS to the Appellant, September 16, 2013
- App. Ex. 10 - Letter from Carole Goodman to the Appellant, September 16, 2013
- App. Ex. 11 - Letter from Suzanne DeGraba to the Appellant, September 18, 2013
- App. Ex. 12 - Return to Work, October 14, 2013
- App. Ex. 13 - PAR letter the Appellant, October 14, 2013
- App. Ex. 14 - Mid-Year Summary, December 6, 2013
- App. Ex. 15 - Return to Work, April 2, 2014
- App. Ex. 16 - Final Summative Report - Tenured Teacher, April 8, 2014
- App. Ex. 17 - E-mails, April 9, 2014
- App. Ex. 18 - Emails, April 21, 2014
- App. Ex. 19 - E-mails, April 22, 2014
- App. Ex. 20 - Peer Assistance and Review Program Report, undated
- App. Ex. 21 - Not introduced
- App. Ex. 22 - Principal's Response Form for the Final Summative Report - Tenured, April 30, 2014
- App. Ex. 23 - Not introduced
- App. Ex. 24 - E-mails, May 8-9, 2014
- App. Ex. 25 - Growth Plan, June 2014 to November 2014
- App. Ex. 26 - Teacher Assignment, June 9, 2014
- App. Ex. 27 - Growth Plan, November 2014 to June 2015
- App. Ex. 28 - Professional Growth System Observation Conference Report, November 13, 2014

- App. Ex. 29 - Professional Growth System Observation Conference Report, date redacted
- App. Ex. 30 - E-mail, November 14, 2014
- App. Ex. 31 – Handwritten note from Michelle Schultze, November 12, 2014
- App. Ex. 32 - Not introduced
- App. Ex. 33 - E-mails, December 18, 2015
- App. Ex. 34 - Not admitted
- App. Ex. 35 - Letter from Willie J. Mahone, Esq., to the MSDE, November 12, 2015
- App. Ex. 36 - Maryland Educator Certificate, January 1, 2014 – December 31, 2018
- App. Ex. 37 - MSDE Achieving “Highly Qualified” Status Under No Child Left Behind (NCLB), A guide for Maryland teachers (revised January 2008)