

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DUVAL COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 20-5259TTS

THOMAS CAGGIANO,

Respondent.

RECOMMENDED ORDER

On May 27, July 13, August 11 and 18, 2021, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (DOAH), conducted a final hearing pursuant to section 120.57(1), Florida Statutes (2020), by the Zoom conference.

APPEARANCES

For Petitioner: Derrel Q. Chatmon, Esquire
Office of General Counsel
City of Jacksonville
Suite 480
117 West Duval Street,
Jacksonville, Florida 32202

For Respondent: Kelly B. Mathis, Esquire
Mathis Law Firm
3577 Cardinal Point Drive
Jacksonville, Florida 32257

STATEMENT OF THE ISSUE

Whether just cause exists to reprimand and suspend Respondent, Thomas Caggiano, for five days without pay from his position as a teacher with

Petitioner, the School Board of Duval County (School Board),¹ for the reasons set forth in the March 26, 2021, correspondence from the School Board, which contained an April 6, 2021, Amended Step III Progressive Discipline Petition.

PRELIMINARY STATEMENT

On November 19, 2020, Victoria N. Schultz, the Assistant Superintendent of Duval County Public Schools, Human Resources Services, sent to Mr. Caggiano, correspondence entitled “Step III Progressive Discipline – Written Reprimand and Suspension Without Pay Pending School Board Approval,” which notified Mr. Caggiano of the Duval County School District’s intention to issue a written reprimand and suspend Mr. Caggiano for five working days from employment, without pay, and to require him to complete a course in Culture Diversity, pending the School Board’s approval, for posts, reports, or comments to posts made on Mr. Caggiano’s Facebook account which Ms. Schultz characterized as containing “inappropriate, derogatory, demeaning and inflammatory material and comments referencing sexual orientation, national origin and domestic abuse”

On March 17, 2021, the School Board filed a Motion for Leave to Amend the November 19, 2020, Step III Progressive Discipline. Having received no response in opposition, the undersigned entered, on March 31, an Order Granting Petitioner’s Motion for Leave to Amend the November 19, 2020, Step III Progressive Discipline. In correspondence dated March 26, 2021, Ms. Schultz provided Mr. Caggiano with an “Amended Step III Progressive Discipline – Written Reprimand and Suspension Without Pay Pending School Board Approval,” which authorized the issuance of Amended Step III Progressive Discipline on April 6, 2021 (Amended Step III Progressive Discipline). The Amended Step III Progressive Discipline correspondence is

¹ The School Board’s official name is “The School Board of Duval County.” § 1001.40, Fla. Stat. (2021) (providing that “[t]he governing body of each school district shall be a district school board. Each district school board is constituted a body corporate by the name of “The School Board of County, Florida.”). The case style has been amended accordingly.

similar to the November 19, 2020, correspondence, but adds an additional post and comment that Mr. Caggiano made on his Facebook account.

The undersigned originally noticed this matter for a final hearing on March 25, 2021. On March 15, 2021, the School Board filed an Unopposed Motion to Continue the Scheduled Hearing Due to the Impact of COVID-19 and New Material Evidence. On that same date, the undersigned entered an Order Granting Continuance and Rescheduling Hearing by Zoom Conference, for May 27, 2021.

The undersigned conducted a final hearing on May 27, July 13, August 11 and 18, 2021. The School Board presented the testimony of: J.N.S., a student at Sandalwood High School (SHS); C.C, a student at SHS; Brannon Lutz, faculty at SHS; Cassie Solliday, faculty at SHS; Randal Allen Lessen, faculty at SHS; Rhonda Shene Motley, administrator at SHS; JC, a student at SHS; Alyson Marie Porak, a parent of students at SHS; Kevin Lee Stika, administrator for Duval County Public Schools; Reginald Lafranc Johnson, supervisor for Duval County Public Schools; Dr. Saryn Hatcher; principal at SHS; Jamie Brennan, school psychologist supervisor for Duval County Public Schools; and Ms. Schultz. The undersigned entered into evidence Petitioner's Exhibits P1 through 12, 14, 15, 21, 24, 25, 27, 29, 30, 32, 36, 38, 39, 42 through 47, 50, 55 through 57, 62 through 64, 66, 67, and 69 through 71. Mr. Caggiano testified on his own behalf, and presented the testimony of his daughter, Arielle Caggiano. Mr. Caggiano did not offer any exhibits into evidence. On rebuttal, the School Board presented the testimony of: Christina Gentzkow, a parent of a student at SHS; Sandra Rocquin, a former administrator at SHS; and Dr. Tiffany Wells, an administrator at SHS. The undersigned entered into evidence Petitioner's Rebuttal Exhibit PR 1.

At the conclusion of the final hearing, the parties jointly requested a 30-day time period after the filing of the transcript to submit their proposed recommended orders. The four-volume Transcript was filed with DOAH on September 9, 2021. The School Board timely filed a Proposed Recommended Order; however, Mr. Caggiano filed his Proposed Recommended Order late. The School Board thereafter, on October 6, 2021, filed a Motion to Strike Respondent's Untimely Proposed Recommended Order or Alternatively Grant Petitioner Leave to supplement (Amend) its Proposed Recommended Order, which indicated that Respondent opposed the striking of his Proposed Recommended Order, but did not oppose leave for the School Board to file a Supplement to its Proposed Recommended Order, and thereafter filed a Response on October 6, 2021, restating that position. On October 8, 2021, the undersigned entered an Order Denying Petitioner's Motion to Strike Respondent's Proposed Recommended Order and Granting Petitioner Leave to File a Supplemental Proposed Recommended Order. The School Board thereafter timely filed a Supplemental Proposed Recommended Order on October 15, 2021.

This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441, 444 (Fla. 5th DCA 2013). Accordingly, all statutory references are to the 2020 codification of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

1. The School Board is charged with the duty to operate, control, and supervise free public schools within Duval County Public Schools. *See* Art. IX, § 4(b), Fla. Const.; § 1012.33(1)(a), Fla. Stat.

2. The School Board and Mr. Caggiano executed a professional service contract, as defined in section 1012.33, Florida Statutes, and he has been employed by the School Board since 1994.

3. The School Board has renewed this professional services contract on an annual basis.

4. The parties' employment relationship is governed by School Board policies, Florida laws, Department of Education rules, and the Collective Bargaining Agreement (CBA) between Duval Teachers United and the School Board. The CBA relevant to this matter was effective from 2017 through 2020.²

Mr. Caggiano's Employment at SHS

5. Mr. Caggiano had been a math teacher at SHS for numerous years, including the time period relevant to the allegations of the Amended Step III Progressive Discipline correspondence. He currently remains employed by the School Board, but is currently not a math teacher at SHS.

6. During his career with the School Board, Mr. Caggiano received positive employment evaluations. Prior to the allegations at issue, the School Board had never disciplined Mr. Caggiano.

7. During the 2019/2020 school year, Mr. Caggiano taught Algebra II. During his career at SHS, he also taught geometry, trigonometry, analytic geometry, calculus, and statistics. He also taught college-level classes for Embry-Riddle Aeronautical University during this time.

8. As a teacher at SHS and an employee of the School Board, Mr. Caggiano received numerous and various training materials and updates concerning governing policies and procedures, electronically (via email).

² The CBA entered into evidence, without objection, and which was unexecuted, states on its cover page that it is effective from 2017 through 2020. However, the same document, in Article XV, section C, states that it is effective from July 1, 2014, through June 30, 2017. As the Amended Step III Progressive Discipline letter references the 2017-2020 CBA, and as no party objected to the CBA that the undersigned accepted into evidence, the undersigned has treated the CBA entered into evidence as the CBA that was in effect during the allegations concerning Mr. Caggiano.

Many of these materials were provided to Mr. Caggiano prior to faculty and staff training, which occurred in the weeks leading up to the start of the school year. Among the various materials provided to Mr. Caggiano (and other faculty) was a handout entitled “Ethics and Professionalism,” provided by Duval County Public Schools’ Office of Equity and Inclusion/Professional Standards. SHS also provided Mr. Caggiano (and other faculty) a link to its handbook, which contained policies, laws, and rules that govern Mr. Caggiano.

9. The “Ethics and Professionalism” training materials contained a section on social media, and stated:

Please ensure that personal social media accounts are set to private. Do not accept friend requests from students or their parents, and use discretion when inviting colleagues to your pages. Please ensure that your social media posts are respectful and do not possess profane, insensitive, or offensive language or images. As a reminder, you may not post photographs or identifying language about your students. It is a violation of FERPA.

In the Acceptable Use Policy (2.1.11), it states “Employees must maintain professional boundaries between themselves and students. Employees will not solicit or engage in inappropriate communications with students verbally, in writing, or electronically regardless of the age of the student. Employees will not engage in any direct electronic communications with students, parents, supervisors, or co-workers whether by e-mail, instant messaging, or other digital media that will adversely affect the employee’s ability to perform his or her job.”

Here are some best practices to follow:

- You are the adult, the teacher, the professional. You are not their friend.

- You are in violation of the Code of Ethics if you post disparaging comments about your colleagues, administration, and/or the Superintendent.
- Do not post material that is illegal, sexually explicit, obscene, derogatory, related to alcohol or drug use, or in violation of copyright laws.
- Do not access social networking sites from your school computer or during work time.
- Be cautious about photos posted online. Students and parents could view them!
- Any information posted to, or communicated through, a social networking site shall not bring disfavor, embarrassment or condemnation to the student, employee or school district.

10. Mr. Caggiano (and other faculty) further received materials and training related to the School Board's Non-Discrimination Policy (Board Policy 10.10), which states:

Duval County Public Schools (DCPS) believes that education should be provided in an atmosphere where differences are understood and appreciated, and where all persons are treated fairly and with respect, and where all persons are free from discrimination, harassment and threats of violence or abuse. School board policy explicitly states, "No person shall, on the basis of a person's actual or perceived identity with regard to race, color, religion, gender or gender identity, age, marital status, disability, sexual orientation, political or religious beliefs, national or ethnic origin, veteran status, or any other distinguishing physical or personality characteristics, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity on in any employment conditions or practices conducted by this School District, except as provided by law."

Previous Incident Involving Transgender Student J.N.S.

11. J.N.S., a student at SHS, is a female transgender student and has identified as female at least since the 2018-2019 school year, her freshman year.

12. In the summer before her sophomore year, after receiving her class assignments for the new academic year, J.N.S. sent an email to all of her new teachers, including Mr. Caggiano. The August 5, 2019, email, sent at 9:21 p.m., stated:

I will be in your class during the 2019-2020 school year, and I would like to let you know that I am a Male-to-Female Transgender student who would like to go by the name [J.N.S.] as well as female pronouns in your class. I am sending this email before the actual school year starts so that there is plenty of time to change it on the roll before then if possible. Thank you very much for carrying out my request, I can't wait to attend your class this year.

13. That same evening, Mr. Caggiano responded to J.N.S.'s email:

I will call you by any reasonable name you like, but the pronouns are not a negotiable thing for me. I will NOT refer to you with female pronouns. If this is not acceptable for you change classes.

J.N.S. testified that most of her remaining teachers responded to this email in a positive fashion, agreeing to her request. J.N.S. also testified that she posted her email interaction with Mr. Caggiano on one of her social media platforms.

14. On August 6, 2019, during the faculty pre-planning period before classes started, SHS held a mandatory training session presented by Dr. Wells as part of the Duval County Public Schools' "All In: Ally for All" program. As part of this training, Dr. Wells presented various Duval County Public Schools policies that included the treatment of transgender students, including that transgender students had a right to be called by names that they chose. Principal Hatcher also attended this training, and stated that all

students had a right to be called by their requested names, including pronouns. A sign-in sheet reflected that Mr. Caggiano attended this training session, although Mr. Caggiano testified that he did not recall attending.

15. On August 7, 2019, J.N.S. contacted the SHS school counselor, Ms. Solliday, to request a transfer out of Mr. Caggiano's class. After conferring with SHS Assistant Principal Motley, Ms. Solliday transferred J.N.S. to a different class with a different teacher.

16. J.N.S. never attended Mr. Caggiano's class, was never his student during the 2019-2020 school year, and has never been a student in Mr. Caggiano's class.

17. On August 12, 2019, Principal Hatcher met with Mr. Caggiano regarding his email response to J.N.S. and to counsel him regarding Duval County Public Schools' policies for addressing students. Principal Hatcher informed Mr. Caggiano that he should use whatever name or pronoun a student asks to be called. Mr. Caggiano testified that he told Principal Hatcher he would stop using all pronouns, and refer to a student by the name requested.

18. Although the School Board devoted a significant amount of time and effort at the final hearing to this incident involving Mr. Caggiano's response to J.N.S.'s email request, this incident is not part of the Amended Step III Progressive Discipline correspondence that is the subject of the instant action. Dr. Hatcher counselled Mr. Caggiano on this issue. The undersigned heard testimony of various students, faculty, administrators, and even a school psychologist concerning this incident, which the undersigned finds provides background to the issues included in the Amended Step III Progressive Discipline correspondence; however, this particular incident does not form the basis for the proposed discipline in the instant proceeding.

Mr. Caggiano's Use of Facebook

19. Mr. Caggiano testified that he decided to set up a Facebook account sometime in 2008, to catch up with old friends. He testified that his daughter,

Arielle, actually set up the account, and told him that his account's settings were "private."

20. Thereafter, Mr. Caggiano stated that he posted and commented on posts of his Facebook "friends," and because he believed his settings were "private," he believed that only those "friends" could see those posts and comments. He testified that "[a]ll my posts were either political commentary, social commentary, or adult humor."

21. Mr. Caggiano did not accept any of his students as Facebook "friends," but did have a few fellow SHS teachers as Facebook "friends." He testified that he did not think anybody from SHS would be able to see his Facebook posts, aside from the fellow SHS teacher "friends."

22. Additionally, at some point in the past, Mr. Caggiano set up a separate Facebook account, called "AP Caggiano," for students in an advanced placement class to post questions or comments concerning a class. Mr. Caggiano testified that he had not used that particular Facebook account in some time.

23. Mr. Caggiano also testified that he never accessed his Facebook account at SHS or during his normal work hours. Mr. Stika, who was a forensic examiner in the Information Technologies department of Duval County Public Schools, testified that Mr. Caggiano did not use his school-issued laptop to access Facebook during the time period relevant to the instant matter.

Amended Step III Progressive Discipline

24. On May 19, 2020, the Duval County Public Schools Office of Equity and Inclusion/Professional Standards received an email concerning Mr. Caggiano's Facebook postings.

25. On May 21, 2020, the Florida Times Union published a story concerning Mr. Caggiano's Facebook postings and comments. The May 19, 2021, email, and the May 21, 2020, newspaper article, caused an

investigation into Mr. Caggiano’s Facebook posts and comments, conducted primarily by Mr. Johnson.

26. Mr. Johnson interviewed parents, students, former students, Principal Hatcher, Mr. Stika, and Mr. Caggiano, as part of this investigation. His findings form the basis for the Amended Step III Progressive Discipline correspondence.

27. As alleged in the Amended Step III Progressive Discipline correspondence, the complainant provided screenshots of Mr. Caggiano’s Facebook postings. Mr. Johnson’s investigation discovered a Facebook account in the name of “Thomas Caggiano,” who was listed as a Duval County Public School teacher. Mr. Caggiano admitted that the Facebook account referenced in the Amended Step III Progressive Discipline correspondence was his personal Facebook account, which his daughter initially set up.

28. As reflected in the Amended Step III Progressive Discipline correspondence, the investigation revealed Mr. Caggiano, commencing on or about January 2020, admitted to 27 various Facebook posts, reposts, or comments. The Amended Step III Progressive Discipline correspondence specifically alleges that “some of your posts and/or comments were as follows[,]” and then lists seven specific posts, reposts, or comments from Mr. Caggiano’s personal Facebook account.³

29. At the final hearing, the undersigned heard testimony and considered evidence of Mr. Caggiano’s Facebook posts, reposts, or comments, including Mr. Caggiano’s testimony, and finds that Mr. Caggiano’s Facebook account reflects the following posts and reposts—which could be considered “memes,” which can be defined as amusing or interesting pictures, videos, etc., that are

³ The School Board introduced into evidence other Facebook posts, reposts, or comments attributed to Mr. Caggiano, and questioned numerous witnesses about this “other” Facebook activity. The undersigned has only considered the allegations contained in the Amended Step III Progressive Discipline correspondence in determining whether the School Board has just cause to discipline Mr. Caggiano.

spread widely through the internet or social media—or comments to memes or articles, that were made, or reposted, by Mr. Caggiano. These seven posts, reposts, or comments, which are the only posts, reports, or comments alleged in the Amended Step III Progressive Discipline, are:

(a) A repost from a Facebook entity called “Messenger of Liberty,” which states: “My son is taking part in a social experiment. He has to wear a Bernie 2020 t-shirt for 2 weeks and see how people react. So far he’s been spit on, punched and had a bottle thrown at him! I’m curious to see what happens when he goes outside.”;

(b) A repost from an individual and an entity called “LIFT – LONG ISLANDERS FOR TRUMP,” which states: “Crazy but TRUE, If this girl sees a penis at a party it’s a crime ... [with an accompanying photograph of a young woman], but if this girl sees a penis in the woman’s bathroom ... it’s tolerance [with an accompanying photograph of a girl in a bathroom]. Vote Republican and put an end to the madness.”

(c) A post authored by Mr. Caggiano which states: “Dumb ass liberals are now organizing protest against the killing of the Iranian general (terrorist) who was responsible for many attacks against the USA. Amazing how TRUMP derangement syndrome can cause democrap, and the main stream media, to support our enemies.”;

(d) A repost from another individual, which appears to be a “screen grab” from a Fox News segment, which states, at the top, “MAN AND WOMAN,” and which then states: “A man goes home and masturbates his typical fantasy. A woman on her knees, a woman tied up, a woman abused. A woman enjoys intercourse with her man—she fantasizes being raped by 3 men simultaneously...” The “screen grab” attributes this quote to Bernie Sanders, currently a United States Senator from Vermont, sometime in the 1970’s (the exhibit copy is unclear), and Mr. Caggiano’s handwritten notes next to this exhibit states “Bernie said this!”;

(e) A repost from a Facebook entity called “Maine Bikers,” which states: “Meanwhile at the ‘Bikers for Bernie’ rally...[,]” and which contains a picture of two nude men on a motorcycle;

(f) What appears to be an attempted repost by Mr. Caggiano, which Facebook apparently removed with the message “False information, Checked by independent fact-checkers,” but which also contains the following comments from Mr. Caggiano: “Teach this childish nasty bitch a lesson. Have her treasonous ass removed from office and put in jail.”; and

(g) A repost, dated August 19, 2020, from Mr. Caggiano, of an article from an entity called “Lifesitenews.com,” with a headline that states, “Teen girls stage school walkout to protest boys in their bathroom who claim to be ‘girls’”; and to which Mr. Caggiano commented, “Love it! About time people stood up to this insanity.”

30. The Amended Step III Progressive Discipline correspondence further alleges:

Resulting from our Facebook postings, your school and district leadership were both impacted as they received several complaints and/or concerns from students, parents and constituents expressing their displeasure with your conduct as a Duval county teacher and the comments displayed within your Facebook account. Many parents also contacted the school and informed the principal that they would not want their children in your class for the 2021-2021 school year. If this administrative action had not occurred, the public consequences would cause an equity issue for other teachers by redistributing your assigned students or assignment of replacement teachers.

While you are certainly entitled to your First Amendment right to free speech, your actions are in direct contradiction to the District’s mission to “Provide educational excellence in every school, in every classroom, for every student, every day.” This is without regard to a student’s ethnicity, race, religious beliefs, gender orientation, political

persuasion, or any other qualifier. In addition, the Principals of Professional Conduct of the Education Profession in Florida (Florida Administrative Code 6A-10.081), requires that an individual, “Take reasonable precautions to distinguish between personal views and those of any educational institution or organization with which the individual is affiliated.”

As an educator you have a duty and/or a responsibility to maintain the respect of the community and your colleagues. You posted and/or shared inappropriate, derogatory, demeaning and inflammatory material and comments referencing sexual orientation, national origin, and domestic abuse on your public social media (Facebook) account. Your conduct was unethical, lacked integrity and violated Duval County School Board policy, as such, warrants corrective discipline.

31. The Amended Step III Progressive Discipline correspondence alleges that Mr. Caggiano’s Facebook posts, reposts, and comments violated section 1006.147, Florida Statutes; Florida Administrative Code Rules; rules 6A-5.053 and 6A-10.081, and Duval County School Board Policies 6.80 and 10.10. It further alleges that, pursuant to article V, section 9, of the CBA, which concerns “potential harm to the physical or mental wellbeing of a student, or students, constitutes more severe acts of misconduct which warrant circumventing progressive disciplinary steps,” and imposed discipline of a written reprimand, five consecutive working days of suspension without pay, and a requirement that Mr. Caggiano complete a course in “Culture Diversity” by a certain date.⁴

Additional Facts Concerning Mr. Caggiano’s Facebook Account

32. J.N.S. testified that at some point after her email interaction with Mr. Caggiano, she was “curious” and decided to access his Facebook account,

⁴ A review of the CBA in evidence shows that the provision of the CBA that addresses progressive discipline may be found in article V, section C, subsections 9 and 10.

and saw numerous posts, including some of the posts that form the basis of the School Board's proposed discipline. She stated that she was "appalled, but not surprised." She also testified that the Florida Times Union reporter who authored the May 21, 2020, article about Mr. Caggiano reached out to her through social media concerning Mr. Caggiano.

33. Ms. Schultz previously served as SHS Principal during the time period that Mr. Caggiano taught at SHS. She recalled seeing Mr. Caggiano's posts that were "forwarded" to her, and she thereafter communicated directly with Mr. Caggiano. She stated that she asked Mr. Caggiano to remove his Facebook posts. In an email exchange between them, after Ms. Schultz informed Mr. Caggiano that she was able to access his Facebook account numerous times after he stated that he had changed his account settings to private, Mr. Caggiano wrote:

Thank you for your email. I have had my daughter assist me in making my Facebook account settings "private," and I have changed my account password. I am going through and removing a number of posts that were made by people that I do not know. I do not want to shut the entire account down, because I have a number of personal photos of my grandkids and me. Please confirm whether you are still able to see the Facebook "wall" for my account. I want to make sure the settings are properly adjusted so that only people whom I accept as "friends" can see what I post at this time.

As you are aware, I have also received inquiries from the Duval County Public Schools Equity & Inclusion/Professional Standards supervisor In the emails, [he] provided me with a link to a Times-Union article by reporter Emily Bloch. [He] inquired whether I posted the items in question, on my Facebook account, as attributed by the writer of the article.

I have reviewed the article. The article indicates that I am not obligated to respond to [his] inquiry. The article states that a "note from the Office of

Equity and Inclusion and Professional Standards added that an inquiry ‘could take some time, as the office cannot compel anyone to meet or speak with us,’ and that I “did not directly reference a student of direct [my] posts at a student in [my] posts,” nor identify myself as a Duval County Public Schools teacher in my posts. Please confirm whether the article’s statement is accurate, as I prefer to only respond on this issue as I am obligated and as is otherwise necessary.

For the record, I view Emily Bloch’s article as a well-timed political hit piece, full of inaccuracies, targeting me for my political views on issues of sexuality, to promote the latest version of the “need” for the City of Jacksonville Human Rights Ordinance (“HRO”), which was illegally passed back in 2017, and recently struck down by a Florida court. It is a transparent attempt to torpedo a good teacher’s career, to score political points. I hope the Duval County Schools will not countenance this reporter’s efforts to manufacture an issue to promote her political causes, especially where the public cannot come out to oppose the latest ordinance, because of Coronavirus.

I treat all of my students with dignity and respect, and my classroom record speaks for itself. I will not lie to my students. I treat all of them with honesty and fairness.

On the other hand, I make no secrets that when I am not acting in my official capacity as a Duval County Schools teacher, I do engage in robust political debate on political issues. I deny making any kind of “phobic” remarks or posts. A “phobia” is an irrational fear. Holding traditional views about the biological nature of sex (and need for sex-based privacy in bathrooms and lockers) is not a “phobia.” Disagreement with the political orthodoxy of the Left on matters of sexuality is not a “phobia.” Sharing my belief on my personal Facebook that there are only two genders that correspond with

biological sex is not a “phobia.” Ms. Bloch may not like the way I make those points, and that is fine. Since I have been active on Facebook, I know I have shared various political memes on my personal Facebook wall, or commented in response to others’ postings. I do not instantly recall them all. Memes are often a good way of making pithy political statements, with a touch of humor. Sometimes “humor” is in the eye of the beholder, or is funny at the time. I’m sure I found certain memes funny or punchy at the time, and I have friends who did as well. I’m sure others may not find them funny, or may disagree with me, as is their right.

I have not gone back through the last year’s worth of Facebook postings, and I am unable to verify some of Ms. Bloch’s attributed quotes. I can confirm that the account settings are now “private.”

I stand by a number of statements Ms. Bloch attributes to me (or at least, I agree with the sentiments expressed, where they may have been posted by me or others). Others I do not.

I will also note that at least one of the specifically quoted references in Ms. Bloch’s article was taken out of context, and she uses that out-of-context quote to suggest my remarks are “racist” or “xenophobic.” I’m neither. In fact, some of my beautiful grandchildren are “biracial” (for lack of a better term – there is only one “race” – the human race). But even having to make that note is offensive, and suggests bigotry and prejudice on the part of Ms. Bloch in leveling that charge against me. For the record, the “corona” or “covid” food reference was a political jab at President Trump’s references to the “CHINA” virus. Nothing more, nothing less.

I trust that the Duval County Schools will continue to respect the rights of teachers to engage in robust political debate on Facebook, on matters of public concern (such as the political “transgenderism” movement – “Exhibit A” of which is the novel “lexicon” Ms. Bloch placed in her article, purporting

to tell the public which terms are acceptable in the debate, and which are not).

The First Amendment surrounds political speech with the highest level of protection, whether some people find the speech of others “offensive,” or wish to silence speakers with whom they disagree.

34. Mr. Caggiano and his daughter, Arielle, testified that it was, and has been, Mr. Caggiano’s intention that his Facebook account settings be “private” so that only his “friends” could see them, and that after the May 21, 2020, Florida Times Union article, they both checked and saw that it was not set to private. Arielle then set Mr. Caggiano’s settings back to private.

35. The School Board called numerous witnesses, including students and parents, who testified about accessing Mr. Caggiano’s Facebook account. None of the student witnesses (including J.N.S.) were students of Mr. Caggiano. Ms. Porak, a parent of students at SHS, testified that neither of her children had Mr. Caggiano for a teacher. The various student and teacher witnesses discussed a number of Mr. Caggiano’s Facebook posts, reposts, and comments, only some of which were contained in the Amended Step III Progressive Discipline correspondence.

Impact of Mr. Caggiano’s Facebook Posts

36. After the publishing of the May 21, 2020, Florida Times Union article, school officials, including Ms. Schultz and Dr. Hatcher, testified to receiving numerous complaints. The undersigned received into evidence numerous complaints from parents concerning Mr. Caggiano’s Facebook posts, some of which were included with Mr. Johnson’s investigative report. Some of these parents also testified at the final hearing concerning their complaints and feelings concerning Mr. Caggiano’s Facebook activity. These parents testified that they felt Mr. Caggiano’s Facebook posts were inappropriate for a teacher.

37. Assistant Principal Motley testified that a total of four students (not including J.N.S.) requested and were transferred out of Mr. Caggiano’s classes during the Spring 2020 semester.

38. Dr. Hatcher testified that after the Duval County Public Schools removed Mr. Caggiano from SHS, it took part of the Fall 2020/2021 semester to hire a full-time replacement teacher. During that semester, several substitute teachers taught what would have been Mr. Caggiano’s math classes before SHS hired a full time teacher.

39. Ms. Brennan testified that Mr. Caggiano’s Facebook posts impacted J.N.S. negatively. Ms. Brennan did not perform a psychological assessment of J.N.S.; the School Board requested that Ms. Brennan provide emotional support to J.N.S. during her preparation as a witness in this matter in March 2021—more than a year after J.N.S. testified that she read Mr. Caggiano’s Facebook posts. Ms. Brennan testified that J.N.S. has experienced symptoms of depression. She also testified that J.N.S.—previously an A-B student her freshman year, and who had few absences her sophomore year—had approximately 345 separate class absences from school her junior year and was retained.

Mr. Caggiano’s Explanation

40. Mr. Caggiano admitted to having authored the Facebook posts, reposts, and comments that are contained in the Amended Step III Progressive Discipline correspondence and detailed in paragraph 29 above.

41. Mr. Caggiano testified that his daughter Arielle “did everything” in setting up his Facebook account, to ensure that his settings were private so that only people he accepted as “friends” could see his posts, reposts, and comments. He further stated that, for the approximately 10 years after establishing his Facebook account, he believed his settings were private. After learning in 2019/2020 that members of the public could view his Facebook account, he again asked Arielle to ensure that it was private.

42. Mr. Caggiano believes his Facebook account was “hacked.” He testified that he believed it to be set to private, and after learning otherwise, “fixed” it. Then, he found it was “public” again. As there was no additional testimony or evidence concerning whether Mr. Caggiano’s Facebook account was hacked, the undersigned does not credit this explanation.

43. Mr. Caggiano testified about the seven posts, reposts, or comments that are the subject of the Amended Step III Progressive Discipline correspondence and detailed in paragraph 29 above. Mr. Caggiano did not express any regret in making any of these Facebook posts, reposts, or comments.

44. With respect to Mr. Caggiano’s repost from a Facebook entity called “Messenger of Liberty,” which states, in part, “My son is taking part in a social experiment[,]” Mr. Caggiano testified that “it’s funny. All my posts were either political commentary, social commentary, or adult humor. And that’s funny. Okay. So for somebody to look at that and not giggle at least, you know, I don’t think you know what funny is. That’s funny.”

45. This particular repost states that, after his son wears a “Bernie” t-shirt, “[s]o far he’s been spit on, punched and had a bottle thrown at him.” Although Mr. Caggiano testified that he believed this to be “funny,” the undersigned finds that it also could be logically read to encourage violence against a child.

46. With respect to Mr. Caggiano’s repost from another individual, which appears to be a “screen grab” from a Fox News segment, which states, at the top, “MAN AND WOMAN,” and which then states: “A man goes home and masturbates his typical fantasy. A woman on her knees, a woman tied up, a woman abused. A woman enjoys intercourse with her man—she fantasizes being raped by 3 men simultaneously...[,]” and which attributes this quote to Bernie Sanders, sometime in the 1970’s (the exhibit copy is unclear), Mr. Caggiano testified that it was not his opinion, but that he was quoting Bernie Sanders, and that “people should know somebody who’s a sitting

senator, twice presidential candidate, former mayor of New York City, has this sort of mentality.”

47. On cross-examination, when asked if “women, teenage girls, could be offended by this post[,]” Mr. Caggiano testified, “I think everybody should be offended by this.” The undersigned finds that despite Mr. Caggiano’s belief that his post makes an important point about Bernie Sanders, the undersigned finds that it can be logically read to be patently offensive, discriminatory, and degrading to women. Mr. Caggiano’s own testimony confirms this.

48. The undersigned finds that the remaining posts, reposts, or comments, can be fairly characterized as political memes that, depending on the viewpoint of the reader, could be characterized as crude political commentary, passionate advocacy, or humor. While these postings, which are generally consistent with a conservative ideology, might not originate from more traditionally respected sources like the *National Review* or the opinion page of the *Wall Street Journal*, they are the type of abrasive political speech that one regularly finds in social media.

49. In particular, with respect to Mr. Caggiano’s repost of the meme entitled “Crazy but TRUE,” and the article from an entity called “Lifesitenews.com,” with a headline that states, “Teen girls stage school walkout to protest boys in their bathroom who claim to be ‘girls’”; and to which Mr. Caggiano commented, “Love it! About time people stood up to this insanity[,]” the undersigned cannot find that these reposts, or Mr. Caggiano’s comments, are related to, or in retaliation to, his email interaction with J.N.S. concerning the use of pronouns, or his subsequent counselling on the subject. Mr. Caggiano testified of his concern about men using a women’s restroom which, while counter to the policy of the Duval County Public

Schools, does not on its face appear to be the type of bullying, harassing, or retaliating prohibited in applicable laws, rules, and policies.

Ultimate Findings of Fact

50. Mr. Caggiano created seven posts, reposts, and comments to posts on his personal Facebook account, which are more fully described in paragraph 29 above.

51. Mr. Caggiano contends that he never intended to share these posts, reposts, and comments publicly, and more specifically, to the SHS community. Mr. Caggiano contends that his Facebook account was hacked, which caused all of his Facebook activity to become public. The undersigned finds that Mr. Caggiano's explanation is not credible, as he testified that he had several SHS teachers as "friends," and as he did not check his Facebook settings for approximately 10 years, before the Duval County Public Schools, and the SHS community, became aware of the seven posts, reposts, and comments. The undersigned finds that Mr. Caggiano posted, reposted, and commented on Facebook on his personal account, and shared them in a manner that did not ensure that they remain private.

52. Ultimately, Mr. Caggiano's Facebook posts, reposts, and comments described in paragraph 29 made their way into the public sphere, and students, parents, Duval County Public Schools personnel, and the media viewed and became aware of them.

53. The undersigned finds that two of the alleged posts, reposts, and comments—entitled "My son is taking part in an experiment," and "MAN AND WOMAN"—warrant further findings that include violations of statutes, rules, and policies enunciated in the Amended Step III Progressive Discipline correspondence. The undersigned does not make such findings with respect to the remaining five posts, reposts, and comments contained in the Amended Step III Progressive discipline correspondence. Accordingly, the following ultimate findings of fact below apply only to the two posts previously mentioned.

54. The two posts at issue concern violence and abuse of a child, as well as discriminatory and degrading views of women being abused and raped.

Mr. Caggiano candidly admitted that the post concerning women was offensive. The undersigned finds that these particular posts violate some of the governing laws, rules, and policies alleged in the Amended Step III Progressive Discipline correspondence.

55. Mr. Caggiano violated rule 6A-10.081(1)(b), because the School Board established, by a preponderance of the evidence, that he failed to exercise best professional judgment and integrity. As a result, the School Board has also established, by a preponderance of the evidence, a violation of rule 6A-5.056(2)(b).

56. Mr. Caggiano violated rule 6A-10.081(1)(c), because the School Board established, by a preponderance of the evidence, that he failed to maintain the respect and confidence of his colleagues, students, and parents, and failed to sustain the highest degree of ethical conduct. As a result, the School Board has also established, by a preponderance of the evidence, a violation of rule 6A-5.056(2)(b), which concerns “misconduct in office.”

57. Mr. Caggiano violated rule 6A-10.081(2)(a)1., because the School Board established, by a preponderance of the evidence, that he failed to make reasonable effort to protect students from conditions harmful to learning and/or to the students’ mental and/or physical health and/or safety. As a result, the School Board has also established, by a preponderance of the evidence, a violation of rules 6A-5.056(2)(b), which concerns “misconduct in office.”

58. Mr. Caggiano violated rule 6A-10.081(2)(a)5., because the School Board established, by a preponderance of the evidence, that he intentionally exposed students to unnecessary embarrassment or disparagement. As a result, the School Board has also established, by a preponderance of the evidence, a violation of rule 6A-5.056(2)(b), which concerns “misconduct in office.”

59. Mr. Caggiano violated rule 6A-10.081(2)(b)1., because the School Board established, by a preponderance of the evidence, that he failed to take reasonable precautions to distinguish between personal views and those of any educational institution or organization with which he is affiliated. As a result, the School Board has also established, by a preponderance of the evidence, a violation of rule 6A-5.056(2)(b), which concerns “misconduct in office.”

60. Mr. Caggiano violated rule 6A-5.056(1), which concerns “immorality,” because the School Board established, by a preponderance of the evidence, that his actions constituted immorality, which is “conduct that brings the individual concerned or the education profession into public disgrace or disrespect and impairs the individual’s service in the community.”

61. Mr. Caggiano violated Duval County School Board Policy 10.10(IV)(A), because the School Board established, by a preponderance of the evidence, that he engaged in conduct that denigrates or shows hostility or aversion toward an individual because of his/her actual or perceived identity with regard to gender.

62. The undersigned finds that the School Board did not establish, by a preponderance of the evidence, that Mr. Caggiano violated section 1006.147(2), which prohibits bullying and harassment.

63. The undersigned finds that the School Board did not establish, by a preponderance of the evidence, that Mr. Caggiano violated rule 6A-10.081(2)(a)6. (“Shall not intentionally violate or deny a student’s legal rights.”), or rule 6A-10.081(2)(c)1. (“Shall maintain honestly in all professional dealings.”).

64. The undersigned finds that the School Board did not establish other alleged violations of Duval County School Board Policy, including bullying or retaliation.

65. The School Board established, with respect to the two aforementioned Facebook posts, that Mr. Caggiano’s conduct constituted “potential harm to

the physical and mental wellbeing of a student, or students[,]” and “behavior that impairs the employee’s effectiveness in performing her/his duties, professionalism, and confidence in the eyes of the students and parents/guardians[,]” and thus, under article V, section C, subsections 9 and 10 of the CBA, it was not required to follow the steps of progressive discipline, and had just cause to reprimand (Step II) and suspend without pay (Step III) Mr. Caggiano, and require him to complete a course in Culture Diversity. However, because the undersigned finds that the School Board did not establish that the remaining Facebook posts violated governing laws, statutes, rules or polices, and because the undersigned further finds that the School Board did not establish that the posts constituted bullying or retaliation, the undersigned finds that a reduction in the proposed discipline is warranted.

CONCLUSIONS OF LAW

66. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569, 120.57(1), and 1012.33(6)(a)2., Florida Statutes.

67. This is a disciplinary proceeding in which the Petitioner seeks to reprimand and suspend Mr. Caggiano as a teacher with the Duval County Public Schools, and require him to complete a course in Culture Diversity.

68. The School Board is a duly constituted school board charged with the duty to operate, control, and supervise all free public schools within the school district of Duval County, Florida, under section 1012.22.

69. This is a *de novo* proceeding designed to formulate agency action, not review agency action taken earlier and preliminarily. *See Dep’t of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981); *Capeletti Bros., Inc. v. Dep’t of Transp.*, 362 So. 2d 346, 348 (Fla. 1st DCA 1978); *McDonald v. Dep’t of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Accordingly, the undersigned is charged in this proceeding with determining anew, based on

the competent substantial evidence in the record, whether just cause exists to reprimand, suspend, and require Mr. Caggiano to complete a course in Culture Diversity.

70. Section 1012.01(2), classifies Mr. Caggiano as “instructional personnel.”

71. Section 1012.33(6)(a) states that, “[a]ny member of the instructional staff ... may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a).”

72. Section 1012.33(1)(a) defines “just cause” as including, but not limited to,

[T]he following instances, as defined by the State Board of Education: immorality, misconduct in office, incompetency, two consecutive annual performance evaluation ratings of unsatisfactory under s. 1012.34, two annual performance ratings of unsatisfactory within a 3-year period under s. 1012.34, three consecutive annual performance ratings of needs improvement or a combination of needs improvement and unsatisfactory under s. 1012.34, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

73. Similarly, section 1012.335(5) provides:

JUST CAUSE.—The State Board of Education shall adopt rules pursuant to ss. 120.536(1) and 120.54 to define the term “just caus.” Just cause includes, but is not limited to:

- (a) Immorality.
- (b) Misconduct in office.
- (c) Incompetency.
- (d) Gross insubordination.

(e) Willful neglect of duty.

(f) Being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilty, any crime involving moral turpitude.

74. Rule 6A-5.056(1) defines immorality as “conduct that is inconsistent with the standards of public conscience and good morals. It is conduct that brings the individual concerned or the education profession into public disgrace or disrespect and impairs the individual’s service in the community.”

75. Rule 6A-5.056(2) defines misconduct in office as,

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6A-10.080, F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;

(c) A violation of the adopted school board rules;

(d) Behavior that disrupts the student’s learning environment; or

(e) Behavior that reduces the teacher’s ability or his or her colleague’s ability to perform duties.

76. The School Board seeks to reprimand, suspend, and require Mr. Caggiano to complete a Culture Diversity course, and has the burden of proving the allegations of the Amended Step III Progressive Discipline correspondence by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence applicable to the loss of a license or certification. *Cropsey v. Sch. Bd. of Manatee Cty.*, 19 So. 3d 351 (Fla. 2d DCA 2009), *rev. denied*, 29 So. 3d 1118 (Fla. 2010); *Cisneros v. Sch. Bd. of Miami-Dade Cty.*, 990 So. 2d 1179 (Fla. 3d DCA 2008).

77. The preponderance of the evidence standard requires proof by “the greater weight of the evidence,” *Black’s Law Dictionary* 1201 (7th ed. 1999),

or evidence that “more likely than not” tends to prove a certain proposition. *See Gross v. Lyons*, 763 So. 2d 276, 281 n.1 (Fla. 2000).

78. It is well established under Florida law that determining whether alleged misconduct violates a statute or rule is a question of ultimate fact to be decided by the trier-of-fact, based on the weight of the evidence. *See Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985); *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995). Thus, determining whether alleged misconduct violates the law is a factual, rather than a legal, inquiry.

79. The allegations of fact set forth in the charging document are the facts upon which this proceeding is predicated. Once the School Board has delineated the offense alleged to justify reprimand, suspension, and requirement of a Culture Diversity class, that is the only ground upon which the discipline may be predicated. *Trevisani v. Dep’t of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005). *See also Klein v. Dep’t of Bus. & Prof’l Reg.*, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); *Cottrill v. Dep’t of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits the School Board from disciplining a teacher based on matters not specifically alleged in the charging document. *See Pilla v. Sch. Bd. of Dade Cty.*, 655 So. 2d 1312, 1314 (Fla. 3d DCA 1995); *Texton v. Hancock*, 359 So. 2d 895, 897 n.2 (Fla. 1st DCA 1978); *see also Sternberg v. Dep’t of Prof’l Reg.*, Bd of Med. Examiners, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985) (“For the hearing officer and the Board to have found Dr. Sternberg guilty of an offense with which he was not charged was to deny him due process.”).

80. An instructional personnel’s guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. *McKinney*, 667 So. 2d at 389; *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1005).

81. The School Board proved, by a preponderance of the evidence, that Mr. Caggiano violated rule 6A-5.056(1) and (2)(b); rule 6A-10.081(1)(b), (c),

(2)(a)1., (2)(a)5., and (2)(b)1.; and Duval County School Board Policy 10.10(IV)(A), by establishing that:

(a) Mr. Caggiano made two posts or reposts on his Facebook account, that are more fully described in paragraph 29(a) and (d) above;

(b) Mr. Caggiano's Facebook account identified that he was an employee of Duval County Public Schools;

(c) While Mr. Caggiano purportedly attempted to maintain his Facebook account settings as "private," he had several Facebook "friends" who were SHS teachers, and ultimately, the public, including students, parents, other teachers, and the local media, had access to Mr. Caggiano's Facebook wall, including the two posts or reposts;

(d) The two aforementioned Facebook posts or reposts concern violence and abuse of a child, as well as discriminatory and degrading views of women being abused and raped.

82. Based on the above, the School Board has demonstrated, by a preponderance of the evidence, just cause in this matter to reprimand, suspend, and require Mr. Caggiano to complete a course in Culture Diversity.

83. The undersigned has considered Mr. Caggiano's contention that his intention was for his Facebook account to remain "private" so that only his friends could see his posts, reposts, or comments. Florida courts have held that generally, content posted on a social media site is neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established. *Nucci v. Target Corp.*, 162 So. 3d 146, 154 (Fla. 4th DCA 2015). The *Nucci* court, reviewing cases from other jurisdictions, noted that the sharing of information with others on a social media network "is the very nature and purpose of these social networking sites else they would cease to exist." *Id.* (quoting *Romano v. Steelcase, Inc.*, 30 Misc.3d 426, 907 N.Y.S.2d 650, 656 (N.Y.Sup.Ct. 2010)). The undersigned rejects Mr. Caggiano's contentions based on the lack of competent, substantial evidence in the record to support such a contention, and pursuant to *Nucci*.

84. Although the CBA provides for progressive discipline, the School Board has established that Mr. Caggiano's two posts and reposts fall within the definition of "more severe acts of misconduct" found in the CBA and thus, under article V, section C, subsections 9 and 10 of the CBA, the School Board has just cause to reprimand and suspend Mr. Caggiano, and to require him to complete a course in Culture Diversity. *See Costin v. Fla. A&M Univ. Bd. of Trs.*, 972 So. 2d 1084, 1086-87 (Fla. 5th DCA 2008) (holding whether employee's misconduct justified dismissal based on terms of the university's progressive discipline rule was "an 'ultimate fact' best left to" the ALJ). However, because the School Board did not establish that the remaining Facebook posts violated governing laws, statutes, rules, or policies, and because the School Board did not establish that the posts constituted bullying or retaliation, the undersigned recommends a reduction in the proposed suspension to the three days.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that the School Board of Duval County enter a final order that: (1) finds that Mr. Caggiano violated rule 6A-5.056(1) and (2)(b); rule 6A-10.081(1)(b), (c), (2)(a)1., (2)(a)5., and (2)(b)1.; and Duval County School Board Policy 10.10(IV)(A) for two public Facebook posts or reposts associated with his Facebook account; (2) finds that Mr. Caggiano did not violate section 1006.147(2), rules 6A-10.081(2)(a)6. or 6A-10.081(2)(c)1., or any remaining portions of Duval County School Board Policy 10.10(IV); (3) issues a written reprimand; (4) suspends Mr. Caggiano, without pay, for three days; and (5) requires Mr. Caggiano to complete a course in Culture Diversity.

DONE AND ENTERED this 15th day of November, 2021, in Tallahassee,
Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of November, 2021.

COPIES FURNISHED:

Derrel Q. Chatmon, Esquire
Office of General Counsel
City of Jacksonville
Suite 480
117 West Duval Street
Jacksonville, Florida 32202

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

Dr. Diana Greene, Superintendent
Duval County School Board
1701 Prudential Drive
Jacksonville, Florida 32207-8152

Kelly B. Mathis, Esquire
Mathis Law Firm
3577 Cardinal Point Drive
Jacksonville, Florida 32257

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

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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