STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Petitioner,)
)
vs.) Case No. 01-1131
)
GREGORY ADAMS,)
)
Respondent.)
_________________________________)
MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Petitioner,)
)
vs.) Case No. 01-1132
)
BRETT T. SCANLON,)
)
Respondent.)
_________________________________)

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held on May 24-25, 2001, in Miami, Florida, and on September 14, 2001, via video-teleconference at sites in Miami and Tallahassee, Florida, before Florence Snyder Rivas, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Madelyn P. Schere, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent Adams: Leslie A. Meek, Esquire
United Teachers of Dade
2200 Biscayne Boulevard
Miami, Florida 33137

For Respondent Scanlon: Jesse J. McCrary, Jr., Esquire
2800 Biscayne Boulevard, Suite 900
Miami, Florida 33137

H. T. Smith, Esquire
1017 Northwest 9th Court
Miami, Florida 33136

STATEMENT OF THE ISSUE

The issue for determination is whether the School Board has proven the allegations set forth in the Notices of Specific Charges dated April 3, 2001, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On March 14, 2001, Petitioner, Miami-Dade County School Board ("Petitioner" or "School Board") acted to suspend and initiate dismissal proceedings against Respondents. The Respondents timely requested hearings pursuant to Section 231.36(6)(a), Florida Statutes. These causes were filed with the Division of Administrative Hearings for formal proceedings on March 22, 2001, and were consolidated for final hearing by Order dated April 10, 2001.

The School Board furnished its Notice of Specific Charges to each Respondent on April 3, 2001. Petitioner alleges that Respondents were guilty of misconduct in office, violation of School Board rules pertaining to conduct unbecoming a School Board employee, corporal punishment, child abuse, violence in the workplace, and violation of the State Board of Education

Rules contained in the Code of Ethics of the Education Profession in Florida (Ethics Code), and the Principles of Professional Conduct for the Education Profession in Florida (Professional Conduct Principles).

At the hearing, the School Board presented the testimony of the following witnesses: William Tagle, School Board police detective; Dr. Diane Cotter, school psychologist qualified as an expert witness without objection; complaining witness Miguel Suarez[1]; Paulette Martin, principal; Carmen Gutierrez, assistant principal; Silvia Gomez, mother of the complaining witness; Martha Ortega, Adrianna Garcia, Millie Johnson, Suzanne Burstein, and Dr. Joseph Finn, teachers; and Dr. Thomasina O'Donnell, district director of Petitioner's Office of Professional Standards (OPS). Petitioner's Exhibits numbered 1-12 were admitted into evidence.

Respondents testified in their own behalf, and presented the testimony of Dr. Charles Miller, parent, and Leah Gilliard, teacher. Respondents' Exhibits numbered 1-4 were admitted into evidence with Exhibit 3 being late-filed by stipulation. These exhibits were submitted and considered on behalf of both Respondents.

Subsequent to the hearing, on June 1, 2001, Petitioner moved to reopen the evidence in order to introduce a copy of a written statement into evidence. The statement was testified about at the time of the hearing but was not located until after the hearing. The motion was granted, and as a result,

the parties were afforded a video-teleconference evidentiary hearing on September 14, 2001.

The parties were unprepared to discuss case law relevant to the statement's admissibility on that date. The undersigned was initially inclined to rule that the copy of the document could not be admitted over objection absent an explanation of what had happened to the original. The parties were afforded leave to submit memorandums of law in support of, or opposition to, the statement's admissibility. Upon consideration of case law, the motion to admit the statement is granted and the document is admitted into evidence as Petitioner's Exhibit 13. It has been considered along with all the other evidence and testimony in the case.

A transcript of the proceedings was filed on June 18, 2001. However, the disposition of this case was substantially delayed by the sudden serious illness of counsel for Respondent Scanlon. The undersigned wishes to acknowledge the efforts of H. T. Smith, Esquire, who entered the case on behalf of Scanlon post-hearing, and worked diligently to assist in the resolution of this case as expeditiously as possible under difficult circumstances.

By stipulation of the parties the deadline for proposed recommended orders was extended to September 30, 2001. All parties filed timely submissions which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The incident giving rise to this case occurred on November 14, 2000. At that time, Respondents Gregory Adams (Adams) and Brett T. Scanlon (Scanlon) were employed as teachers by the School Board and assigned to William Chapman Elementary School (Chapman). Adams has been employed by the School Board since August 1996, and has taught at Chapman since 1998.

2. Scanlon has been employed by the School Board at Chapman since October 1999. Adams and Scanlon shared a second grade classroom during Scanlon's first year at Chapman, and Adams became a mentor to him. At the start of the 2000/2001 school year, Scanlon was assigned to teach third grade, while Adams continued to teach second grade.

3. The complaining witness against Adams and Scanlon, Miguel Suarez (Miguel), was nine years old at the time of the incident. Like many of the teachers and administrators at Chapman, Miguel is of Hispanic origin. English is his second language.

4. Miguel's academic functioning is quite low. In terms of expressing himself, he functions at a four or five-year-old level. His memory functions no better than that of a five-year-old. He was not sure, for example, what school he had attended last year. Miguel is unable to reliably sequence

events. He is eager to please and, at least in the presence of the undersigned, attempted to ascertain what adult authority figures wanted and to give it to them.

5. Miguel's learning disabilities are not the first thing one notices about Miguel. Indeed, Miguel began the 2000/2001 school year as a second grade student in a regular education class. It was not until mid-October that the professional educators who worked with him daily mustered sufficient evidence to identify his learning disabilities and appropriately place him into a learning disabilities (LD) program for part of the day.

6. Miguel's family is not adept at communicating effectively with school teachers and administrators. Miguel's mother, Silvia Gomez (Gomez), does not strive for a united front between home and school.

7. In addition to his mother, Miguel resides with her live-in boyfriend. Both are irregularly employed. Sometime prior to the incident on November 14, 2000, Miguel's father had committed suicide. Miguel was aware that his father had died, but had never received counseling directed to this loss.

8. Adams is an African-American from an impoverished, hardscrabble background. Out of seven siblings, he and one other have achieved a college education. Adams feels an obligation to encourage children of similar background.

Scanlon is a white male, who previously served in the armed forces. His professional bearing is reminiscent of what official Miami used to look like. He too is committed to teaching.

9. At the time of the final hearing, Chapman's racial and ethnic composition, as well as the mix of English and Spanish spoken as first languages, typifies the rich diversity of Miami-Dade County in the 21st century. But it also provided fertile ground for misunderstanding, miscommunication, and mixed signals.

10. Compounding the potential for trouble at Chapman, at the time of the incident, some teachers employed a practice called "time-out" to deal with students with whom they were having a problem at a moment when they were not able or willing to deal with the problem themselves.

11. Time-out, though not part of the officially approved discipline program at Chapman, was widely known in the school. The practice was discontinued after and as a direct result of this incident. At the time of the incident, Adams and Scanlon had a good faith belief that it was a form of professional courtesy within the school, and not an act which would place one's career in jeopardy.

12. Time-out was initiated by the teacher having difficulty with a particular student. She would take or send

the disruptive student to a fellow teacher who would use his own discretion in returning the child to a compliant mode. Sometimes, the mere act of sending the child to another teacher was sufficient to inspire contrition. Sometimes it wasn't. Sometimes a child would join the time-out teacher's classroom. Sometimes the child would be taken to a private area and given a stern lecture.

13. Miguel, due to his learning disabilities and in particular his extremely poor communication skills, was not a good candidate to respond positively to a stern lecture. Rather, it was frightening to him, particularly when delivered by two adult male teachers previously unknown to him.

14. Adams, on the other hand, had good results in the past with students referred to him for time-out. Adams was experienced in administering time-outs for fellow teachers, and the record reflects no complaints about either Respondent's techniques with reference to their handling of time-outs.

15. Adams and Scanlon had no knowledge of Miguel’s limitations and special circumstances on November 14, 2000, when one of Miguel’s teachers, Leah Gilliard (Gilliard), was angry at Miguel for “helping” to collect books without permission.

16. Gilliard delivered Miguel to Adams, who in turn sought the assistance of his colleague Scanlon.

17. Miguel’s time-out ended in a student bathroom, where Respondents used language and metaphors which may have been effective with a third grader of average communication skills, but which served only to frighten Miguel.

18. In particular, Scanlon asked Miguel why he wanted to throw his life away and if he wanted to flush everything down the toilet. Asked by Scanlon questions to the effect of why he was throwing his education away like he was flushing it down the toilet, Miguel started laughing. It may well be that Miguel laughed out of fear, or confusion, but Scanlon and Adams perceived disrespect.

19. Rather than switch metaphors, Adams took Miguel to a child-size toilet stall and said “This is your life going down the drain if you don't get serious about education.” As he said this, he flushed the toilet with his foot.

20. Miguel was sufficiently chastened to obey Adams' direction to apologize to Scanlon for having been (in Respondents' perception) rude. Miguel did not cry or exhibit other signs of distress to Respondents as they escorted him from the bathroom.

21. Scanlon returned to his own classroom and Adams returned Miguel to Gilliard. At Adams' direction, Miguel apologized to Gilliard and the time-out ended.

22. Miguel said nothing of the incident until later that night. At bedtime, Miguel told Gomez that “a brown man and a white man” had “put his head in the toilet.” Gomez did not take the claim seriously, and Miguel was not agitated or upset. Gomez told Miguel to go to sleep and he did so.

23. The next morning, however, Miguel said he did not want to go to school, so his mother went to school with him. In the presence of Miguel, she first met with Gilliard, and next with teacher Millie Johnson (Johnson). Johnson, on hearing the toilet story, said to Miguel in a loud and “forceful” voice, “They didn't really do that, did they?” Miguel answered, “They almost.”

24. Adams was summoned, and admitted to having had Miguel in his custody for time-out, but not to any type of physical abuse.

25. By this time, Miguel had told at least three adults, his mother, Gilliard, and Johnson, that he, Adams, Scanlon, and a flushing toilet were all in proximity to one another while Miguel was being sternly double-teamed on the subject of his behavior—-a fact which Adams and Scanlon do not dispute.

26. Dissatisfied with Adams' explanation, an angry Gomez left an upset Miguel behind at school to be cared for by teachers, administrators, and counselors who were busy with their regular work. As the day progressed, Miguel was required to tell his story to no fewer than four more teachers and administrators.

27. Miguel began to add substantially and horrifically to the story he had told his mother the night before. Meanwhile, Adams and Scanlon were immediately transferred out of Chapman and assigned to a district office.

28. At different times and places, Miguel has claimed that Adams kicked walls and slammed doors; that Scanlon threatened to cut off his tongue and his fingers; that Adams threatened to cut out his tongue and teeth; and that Adams pushed his head just inside the rim of the toilet seat, near the water, and asked, "Do you want to drown?"

29. In addition, Miguel has claimed that both teachers took him to a stairwell where Adams told Miguel that he would drop him down the stairs, pull out his teeth, and do "something" to him if he told his mother. Miguel's story has grown to include allegations that one or both teachers made him stand on one foot and pretended to push him down the stairs. It is also alleged that Adams made him run up and

down the stairs chasing an unidentified boy that they had picked up on their way to the stairs.

30. For reasons not reflected in the record, a couple of days after the incident, Miguel's mother's live-in companion came to the school office screaming, “How could teachers do this!”

31. For several days following his mother's visit to Chapman, Miguel was agitated and did not want to go to his homeroom. The record is unclear as to whether his agitation was the product of the November 14th incident, or adult reaction to it as horrific details were added, or being simply overwhelmed by the attention.

32. Soon after the incident, Miguel was administratively promoted to a third grade homeroom. He continues to be enrolled at Chapman.

33. Gomez retained an attorney to pursue a civil action on Miguel's behalf. At the time of the final hearing in this case, the incident which occurred on November 14 is in active litigation and requires a significant amount of Miguel's time. He is fearful of failing this year because he is missing a lot of school due to the legal proceedings.

34. Gomez and her lawyer sought and received publicity for their claims against Petitioner. In seeking media coverage they knowingly and voluntarily made Miguel's identity

a matter of public notoriety for purposes of influencing the outcome of the litigation.

35. Because Petitioner's case rests entirely upon Miguel's claims that he was subjected to criminal conduct far beyond the time-out described by Adams and Scanlon, the undersigned paid careful attention to his demeanor under oath. Miguel attended a significant portion of the final hearing accompanied by his mother and his lawyer, and listened again to teachers' accounts of what he had allegedly told them about the incident.

36. Miguel's time on the witness stand was prolonged because he had significant difficulty understanding questions and even more difficulty in recalling and recounting facts crucial to the allegations against Respondents. On several occasions his attempted answers were simply unintelligible.

37. Miguel's family, by virtue of its lawsuit against Petitioner, had an obvious financial stake in telling as horrifying a tale as possible.

38. Similarly, Adams and Scanlon, whose careers and livelihoods are at stake, are motivated to downplay the extent of their efforts to intimidate Miguel into improving his behavior. The undersigned, therefore, carefully observed Respondents' demeanor as they testified.

39. The testimony of the Respondents and of Miguel, when evaluated in the context of the entire record, reveals that Petitioner has failed to establish that Miguel was abused in the manner described in the Notice of Specific Charges. Rather, the version of the incident recounted by Adams and Scanlon is far closer to the truth.

40. The Petitioner's allegations are utterly inconsistent with any evidence presented about the character and professional career of Adams and Scanlon. In addition, they are so horrific that one would expect that a child who had suffered such treatment would be far more traumatized than the cheerful, if intimidated, little boy who testified at the final hearing.

41. The undersigned attaches particular significance to Gomez' claim at the final hearing that on the night of the incident, Miguel reported to her most, if not all, of the abuse allegations against Adams and Scanlon. Yet, all of Petitioner's witnesses agree that when Gomez confronted Adams and school authorities the following day, she said nothing of the alleged threats of violence and death made against her son.

42. Gomez claims she did not mention the abuse allegations the next day because she deemed them unimportant when measured against the fact that--taking the evidence in

the light most favorable to the Petitioner--Miguel's head had been placed near, but not in, the toilet water. The undersigned rejects Gomez' testimony that Miguel in fact claimed, on the night of November 14th, that he had been subjected to violence, physical abuse, and death threats. Not only did Gomez fail to mention these most serious charges to any of the teachers or administrators, she never mentioned them to school police.

43. It is also significant that the day after the incident, Miguel did not suggest to anyone that any other children were present on the stairs. It was not until his deposition was taken in May 2001, that Miguel stated that another little boy was on the stairs and that the “Brown man” pulled the little boy from class and made both of them run up and down stairs. There is no corroborating evidence that this child exists, or this incident took place on November 14th nor at any other time.

44. Neither is there any corroboration of any kind for Miguel's testimony that several children were in the bathroom at one time or other during the course of the incident and each of these children was ordered out by Adams or Scanlon. Such witnesses, if they existed, would be of obvious value in providing disinterested testimony as to, at a minimum, the demeanor of the Respondents during the incident. Being kicked

out of a bathroom by a teacher is not a daily occurrence. Had multiple children been subjected to this unusual behavior by two teachers who were preparing to or were in the process of abusing a second grader, it should not have been difficult to identify them 24 hours later.

45. Petitioner attempted to corroborate Miguel's testimony through a school psychologist, Diane Cotter (Cotter). She opined that the alleged abuse actually occurred. Cotter has no personal knowledge of the incident, does not treat Miguel, and has no credentials in forensic psychology.

46. With deference to the witness, the undersigned disagrees with her opinion as to Miguel's reliability.

47. The record as a whole establishes that Miguel's story grew in direct response to the attention and reinforcement he was receiving as the flushing toilet story was embellished with allegations of criminal child abuse.

48. Petitioner, at its duly-noticed meeting of March 14, 2001, took action to suspend Adams and Scanlon without pay and to initiate dismissal proceedings against them pursuant to Sections 230.23(5)(f) and 231.36(6)(a), Florida Statutes.

CONCLUSIONS OF LAW

49. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of these proceedings. Sections 120.569 and 120.57, Florida Statutes.

50. At all times material hereto, Petitioner was a duly-constituted school board charged with the duty to operate, control, and supervise all free public schools within the School District of Miami-Dade County, Florida. Article IX, Constitution of the State of Florida. Section 230.03, Florida Statutes.

51. Since Petitioner seeks only to dismiss Respondents as employees, but not to revoke their teaching certificates, it need only prove the allegations set forth in the Notice of Specific Charges by a preponderance of the evidence. Allen v. School Board of Dade County, 571 So. 2d 568 (3d DCA 1990); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

52. The complaining witness is competent to testify and his testimony was considered along with all other evidence and testimony in the case.

53. The Petitioner has alleged that Respondents are guilty of misconduct in office, violation of School Board rules pertaining to employee conduct, violence in the

workplace, failure to report child abuse, corporal punishment, and the Ethics Code and Professional Conduct Principles.

54. Rule 6B-4.009, Florida Administrative Code, provides in pertinent part as follows:

> (3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

55. Rule 6B-1.001, Florida Administrative Code, the Ethics Code, provides in pertinent part, as follows:

> (1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence. . . .
> (2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.
> (3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

56. Rule 6B-1.006, Florida Administrative Code, the Principles of Professional Conduct, provides in pertinent part, as follows:

> (3) Obligation to the student requires that the individual:

(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student’s mental and/or physical health and/or safety.

* * *

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

(f) Shall not intentionally violate or deny a student’s legal rights.

57. Petitioner contends that Respondents have violated Rule 6B-1.001(3)(a),(e), and (f), Florida Administrative Code, in that they failed to value Miguel's worth and dignity; failed to exhibit a professional concern for Miguel; failed to exercise the best professional judgment; and failed to maintain the respect of their colleagues, parents and members of the community. Violation of any of these rules comprises just cause for the termination of Respondents' employment.

58. Petitioner further contends that Respondents have violated Rule 6B-1.006(1),(2), and (3), Florida Administrative Code, in that they failed to protect Miguel from conditions harmful to his learning, mental and/or physical health and/or safety; have exposed Miguel to unnecessary disparagement; and have intentionally violated his legal rights.

59. As to each of the foregoing charges, the only evidence against Respondents is Miguel's testimony. For the reasons set forth in the Findings of Fact, the undersigned does not credit Miguel's shifting and escalating accounts of

what transpired between him and Respondents on November 14, 2000.

60. The expert testimony of school psychologist Cotter, considered in its entirety and in the context of the record as a whole, is nothing more than vouching for Miguel's credibility. The trier of fact is not bound by the expert's opinion as to the believability of a witness. Troinger v. State of Florida, 300 So. 2d 310 (Fla. 1974); Ward v. State of Florida, 519 So. 2d 1082 (Fla. 3d DCA 1988). Put another way, expert testimony may not be offered to directly vouch for the credibility of a witness. Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986).

61. The School Board has failed to demonstrate by a preponderance of evidence that Adams and/or Scanlon committed any or all of the specific acts of abuse alleged. Rather, the evidence establishes the ill-fated time-out began with the best of intentions on the part of both teachers who were acting in accordance with an established, although not formally acknowledged, practice within the school of teachers supporting and assisting one another in dealing with children who were, for whatever reason, beyond a particular teacher's ability to deal with at a given moment.

62. Although Petitioner has claimed that other students could corroborate aspects of Miguel's story, no corroborating

witnesses have been produced. There are no physical indications of abuse. There is no evidence that Miguel would even remember this incident were it not for the ongoing reminders which come with the litigation process. There is no evidence of mental or emotional trauma on a level approaching what would be expected in a child who had been subjected to even one of the traumatic events alleged, let alone all of them. There was no evidence that Miguel responds to terror by falling silent, rather than crying out in fear, or crying promptly upon being released into the custody of his family. Instead, the evidence is that he was calm on his return to class, and calm until the next morning.

63. While it is theoretically possible that two dedicated teachers with unblemished records could simultaneously turn into monsters, the more probable explanation is that Miguel was in fact distressed and angry about the dressing down he received that day. When he finally told his mother the story at bedtime, he did not get the reaction he hoped for. Whether he decided to embellish the story to gain sympathy, or whether he did in fact become more distressed the longer he thought about the incident is unknowable. What the evidence does establish, however, is that Miguel's story grew in direct proportion to the amount of attention he received in the telling.

64. Because the evidence establishes that Adams' and Scanlon's accounts of the event are substantially truthful, and that Miguel's is not, the record as a whole compels the conclusion that Petitioner has failed to prove misconduct in office, and lacks just cause for the termination of Respondents' employment.

65. Petitioner argues that Scanlon's acknowledgment on cross-examination that he would not have wanted his own child to experience what Miguel experienced is, in and of itself, an admission that Scanlon had, at a minimum, reason to suspect child abuse by Adams and therefore had a duty to report same. The undersigned observed the demeanor of the interested witnesses with particular care. Observation of Scanlon under oath, coupled with a careful review of the actual question asked and answer given in the context of the entire final hearing, indicates that Scanlon provided an ambiguous answer to an ambiguous question. The record reveals that Scanlon has denied every specific allegation of abuse from the very beginning and throughout the final hearing. In that context, what the Petitioner seeks to characterize as an admission is, at most, an acknowledgment that if he knew then what he knows now, he'd have let Gilliard deal with her own problem students.

RECOMMENDATION

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

RECOMMENDED that the Miami-Dade County School Board issue a final order reinstating Gregory Adams and Brett T. Scanlon with back pay.

DONE AND ORDERED this 26th day of October, 2001, in Tallahassee, Leon County, Florida.

____
FLORENCE SNYDER RIVAS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 2001.

ENDNOTE

[1/] For reasons discussed in the Findings of Fact, below, Miguel's right to keep his identity secret has been waived.

COPIES FURNISHED:

Madelyn P. Schere, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

Leslie A. Meek, Esquire
United Teachers of Dade
2200 Biscayne Boulevard
Miami, Florida 33137

Jesse J. McCrary, Jr., Esquire
2800 Biscayne Boulevard, Suite 900
Miami, Florida 33137

H. T. Smith, Esquire
1017 Northwest 9th Court
Miami, Florida 33136

Dr. Roger C. Cuevas, Superintendent
Miami-Dade County School Board
1450 Northeast Second Avenue
Miami, Florida 33132

James A. Robinson, General Counsel
Department of Education
The Capitol, Suite 1701
Tallahassee, Florida 32399-0400

NOTICE OF RIGHT TO FILE 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.