

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN L. WINN, (formerly JIM )  
HORNE), AS COMMISSIONER OF )  
EDUCATION, )  
 )  
Petitioner, )  
 ) Case No. 04-2166PL  
vs. )  
 )  
NATALIE WHALEN, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on May 3 and 4, 2005, in Perry, Florida.

APPEARANCES

For Petitioner John L. Winn, as Commissioner of Education  
(formerly Jim Horne, as Commissioner of Education):

Brian A. Newman, Esquire  
Pennington, Moore, Wilkinson,  
Bell & Dunbar, P.A.  
215 South Monroe Street, 2nd Floor  
Tallahassee, Florida 32301

For Respondent: Mary Aspros, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether the allegations contained in the Second Amended Administrative Complaint filed by Petitioner are true, and if so, what discipline should be imposed.

PRELIMINARY STATEMENT

By an Administrative Complaint dated March 10, 2004, the Commissioner of Education (Commissioner), alleged that Natalie Whalen (Dr. Whalen), a teacher employed by District School Board of Taylor County, Florida (School Board), utilized inappropriate physical restraint techniques on a student by chaining the student to a chair during 1999; by berating students for an extended period of time and by maltreating S.O. on November 20, 2002; and by physically maltreating students in April 2003. On August 18, 2004, leave was granted to the Commissioner to file an Amended Administrative Complaint which added the allegation that Dr. Whalen had grabbed student S.A. by the hair of his head and had threatened to "pull the hair out of his head." On March 4, 2005, leave was granted to file a Second Amended Administrative Complaint which additionally alleged, among other things, that on January 19, 2005, Dr. Whalen bit student J.R.

Dr. Whalen timely asserted her right to an administrative hearing with regard to the Administrative Complaint, the Amended Administrative Complaint, and the Second Amended Administrative Complaint.

A hearing was set for August 23 and 24, 2004, in Perry, Florida. Subsequent to the filing of the Amended Administrative Complaint the hearing was rescheduled for October 13 and 14, 2004. Pursuant to Respondent's Uncontested Motion to Continue Hearing, the matter was rescheduled for December 8 and 9, 2004. Pursuant to Petitioner's Motion to Continue, the matter was rescheduled for January 25 and 26, 2005. Pursuant to a Motion to Continue by Respondent, citing a medical emergency, the matter was rescheduled for March 21 and 22, 2005. Subsequently, upon the filing of the Second Amended Administrative Complaint, and the consolidation for hearing of this case with Taylor County School Board v. Natalie Whalen, DOAH Case No. 05-0759, the case was continued yet again. The case was thereafter set for May 3 and 4, 2005, in Perry, Florida, and heard as scheduled.

This case was tried in conjunction with DOAH Case No. 05-0759, which was an action against Dr. Whalen brought by the School Board, seeking to terminate her employment as a teacher.

The School Board and the Commissioner called eleven witnesses, and the Commissioner had Exhibit Nos. 1 through 12 entered into evidence. The School Board had Exhibit Nos. 1 through 6 entered into evidence.

Dr. Whalen testified on her own behalf and called five witnesses. She had Exhibit Nos. 1 through 2 entered into evidence.

A Transcript was filed on May 20, 2005. Petitioner and Respondent timely filed Proposed Recommended Orders and they were considered in the preparation of this Recommended Order.

References are to Florida Statutes (2004) unless otherwise noted.

#### FINDINGS OF FACT

1. The School Board has employed Dr. Whalen since 1997. She first worked as a teacher at Gladys Morse Elementary School. When Morse closed she was transferred to Taylor Elementary School, a new school. She continued teaching at Taylor Elementary School until January 19, 2005. Her employment was pursuant to a professional services contract. Dr. Whalen holds Florida Educator's Certificate No. 530568.

2. Dr. Whalen has been confined to a wheelchair for almost 55 years. She cannot move her lower extremities and she is without feeling in her lower extremities. On January 19, 2005, she was approximately 58 years of age.

3. During times pertinent Dr. Whalen taught a "varying exceptionalities" class. A "varying exceptionalities" class is provided for students who have a specific learning disability, or have emotional difficulties, or who have a physical handicap.

She has been an exceptional student education teacher for about 20 years. She has never been disciplined by an employer during her career. In addition to her teaching activities she is also County Coordinator for the Special Olympics.

4. The Commissioner of Education is the chief educational officer of the state and is responsible for giving full assistance to the State Board of Education in enforcing compliance with the mission and goals of the K-20 education system. The State Board of Education's mission includes the provision of certification requirements for all school-based personnel. The Education Practices Commission is appointed by the State Board of Education and has the authority to discipline teachers.

#### Nonviolent Crisis Intervention

5. Kathy Kriedler is currently a teacher at Taylor Elementary School. She is certified in teaching emotionally impaired children and has taught emotionally impaired children in Taylor County since 1983. She is an outstanding teacher who was recently named Taylor County Elementary School Teacher of the Year and Taylor County District Teacher of the Year.

6. Ms. Kriedler is a master level instructor in Nonviolent Crisis Intervention, which is a program of the Crisis Prevention Institute. The use of skills associated with the program is generally referred to as CPI. CPI arms teachers with the skills

necessary to de-escalate a crisis involving a student, or, in the event de-escalation fails, provides the skills necessary to physically control students. Ms. Kriedler has been the School Board's CPI teacher since 1987.

7. CPI teaches that there are four stages of crisis development and provides four staff responses to each stage. These stages and responses are: (1) Anxiety-Supportive; (2) Defensive-Directive; (3) Acting Out Person-Nonviolent Physical Crisis Intervention; and (4) Tension Reduction-Therapeutic Rapport. The thrust of CPI is the avoidance of physical intervention when possible.

8. The CPI Workbook notes that, "The crisis development model . . . is an extremely valuable tool that can be utilized to determine where a person is during an escalation process." It then notes, helpfully, "Granted, human behavior is not an orderly 1-4 progression."

9. The CPI Workbook provides certain responses for a situation that has devolved into violence. CPI physical control techniques include the "children's control position" which is also referred to as the "basket hold." CPI also provides a maneuver called the "bite release" which is used when a child bites a teacher and the "choke release" which is used when a child chokes a teacher.

10. CPI specifically forbids sitting or lying on a child who is lying on the floor because this could cause "positional asphyxia." In other words, an adult who lies upon a child could prevent a child from breathing. CPI holds are not to be used for punishment.

11. The School Board encourages teachers to learn and apply CPI in their dealings with students. The use of CPI is not, however, mandatory School Board policy nor is it required by the State Board of Education.

12. Dr. Whalen took and passed Ms. Kriedler's CPI course and took and passed her refresher course. She had at least 16 hours of instruction in CPI. She could not accomplish some of the holds taught because of her physical handicap.

#### The alleged chain incident

13. Ms. Amanda Colleen Fuquay taught with Dr. Whalen when both of them were teachers at Gladys Morse Elementary School. Ms. Fuquay, like Dr. Whalen, taught exceptional children.

14. Ms. Fuquay's first teaching job after receipt of her bachelor's degree was at Morse Elementary School. At the time Ms. Fuquay began teaching, Dr. Whalen was also a teacher at Morse. The record does not reveal when Ms. Fuqua initially began teaching at Morse, but it was after 1997 and before August 2002, when Morse Elementary merged into the new Taylor Elementary School.

15. During Ms. Fuqua's first year of teaching she entered Dr. Whalen's class. She testified that upon entry she observed a male student chained to a chair at his desk. The chain may have been about the size of a dog choker. She said that the chain ran through the student's belt loop and around the chair. Ms. Fuqua said that she inquired of Dr. Whalen as to the reason for the chain and she replied, in perhaps a joking way, that the student wouldn't sit down.

16. The evidence does not reveal when this occurred or even in what year it occurred. The evidence does not reveal the name of the alleged victim. The evidence does not reveal the victim's response to being chained to the chair. The evidence does not reveal whether Dr. Whalen chained the child or if someone else chained the child or if it just appeared that the child was chained. Robin Whiddon was Dr. Whalen's aide for school years 1998-99, 1999-2000, and 2000-2001, and she testified at the hearing. She did not mention this incident.

17. Ms. Fuqua could not discern if this was a serious matter or whether it was some sort of a joke. She said, "I didn't have a clue." Ms. Fuqua failed to report this incident because she was new to teaching and she had not, "learned the ropes."

18. Dr. Whalen denied under oath that she had ever chained a student to a chair, and specifically denied that she had done



it in 1999, which is within the time frame that Ms. Fuqua could have observed this. Moreover, she specifically denied having chains in her classroom.

19. The Commissioner has the burden of proving the facts in this case, as will be discussed in detail below, by clear and convincing evidence. Undoubtedly, Ms. Fuqua saw a chain of some sort that appeared to be positioned in such a manner as to restrain the unidentified student. However, the lack of any corroborating evidence, the paucity of details, and the denial of wrong-doing by Dr. Whalen prevents a finding, by clear and convincing evidence, of maltreatment.

The alleged incident involving S.A.

20. On August 13, 1998, at Morse, Ms. Kriedler was called by Dr. Whalen to her class. When Ms. Kriedler entered the class she observed Dr. Whalen holding S.A.'s arms to his desk with her right hand and holding the hair of his head by her left hand. She stated to Ms. Kriedler that, "If he moves a quarter of an inch, I'm going to rip the hair out of his head." Dr. Whalen also related that S.A. had kicked her.

21. Dr. Whalen also said to S.A., in the presence of Ms. Kriedler, "Go ahead and kick me because I can't feel it." This referred to her handicap. By this time S.A. was motionless. After a discussion with Ms. Kriedler, Dr. Whalen released S.A. and Ms. Kriedler took him to her classroom.

Subsequently, Ms. Kriedler requested that he be transferred to her class and that request was granted.

22. Ms. Kriedler reported this incident to Shona Murphy, the Taylor County School District Exceptional Student Education Administrator. Ms. Murphy stated that Ms. Kriedler reported to her that that S.A. was flailing about and kicking when Dr. Whalen threatened to pull his hair.

23. Robin Whiddon was Dr. Whalen's aide on August 13, 1998. She recalls S.A. and described him as a troubled young man who was full of anger. He would sometimes come to school appearing disheveled. He had blond hair that was usually short. Ms. Whiddon has observed him lash out at others with his hands.

24. Ms. Whiddon was not present in the classroom when the incident described by Ms. Kriedler occurred. However, upon her return to the classroom, Dr. Whalen informed her that she had grabbed S.A. by the hair until she could control him.

25. Ms. Murphy discussed the incident with Principal Izell Montgomery and Superintendent Oscar Howard in late August 1998. As a result of the discussions, these officials decided to video-tape Dr. Whalen's classroom, and to take no other action.

26. Dr. Whalen denied under oath that she grabbed S.A.'s hair.

27. Despite Dr. Whalen's assertion to the contrary and upon consideration of all of the evidence, it has been

proven by clear and convincing evidence that Dr. Whalen grabbed and held S.A.'s hair and threatened to pull it out.

28. Grabbing a student's hair is not an approved CPI hold. However, at the time this occurred Dr. Whalen was not required to use CPI methods. Grabbing a student's hair is generally unacceptable conduct unless, for instance, it is done in self-defense, or in order to protect the student or others.

29. It has been not been proven by clear and convincing evidence that grabbing S.A.'s hair was impermissible. Dr. Whalen told Ms. Kriedler that S.A. had been kicking her. This statement raises the possibility that the action was initiated as a self-defense measure. When one considers that Dr. Whalen has limited mobility, and that her aide was not present, she was permitted to take reasonable actions to defend herself. Grabbing a student's hair may have been reasonable under the circumstances and, in the event, the record does not provide enough evidence to permit a determination.

The video-tape of November 20, 2002

30. A video-tape, that included audio, and which was made part of the record of the case, portrays events on the morning of November 20, 2002. The video-tape was brought to the attention of the school administration by a parent who had received the video-tape from Dr. Whalen. The picture quality of the video is satisfactory but the audio is derived from a

microphone near Dr. Whalen's desk. Therefore, it is clear that the microphone did not record all of the words spoken in the classroom at the time and date pertinent. Accordingly, facts found as a result of viewing the video-tape are limited to those which are clearly depicted by it.

31. The School Board had discussed the wearing of apparel with representations of the Confederate battle flag on them in a meeting immediately prior to November 20, 2002. Early in the morning of November 20, 2002, there was a discussion with regard to the School Board deliberations among some of Dr. Whalen's students. The discussion came close to degenerating into physical conflict. This was reported to Dr. Whalen's aide, Ruth Ann Austin. It was further reported that some students called some of their fellow students "rebels," and others called other students "Yankees" and "gangsters."

32. Assistant Principal Verges visited the classroom at the beginning of the school day, at Dr. Whalen's request, and he explained the matters discussed at the School Board meeting.

33. Upon the departure of Assistant Principal Verges, Dr. Whalen unleashed a torrent of criticism upon her students addressing the subject of name-calling. Dr. Whalen spoke to the students in a loud and threatening tone of voice. While delivering this tirade, Dr. Whalen traveled to and fro in her

motorized wheelchair. The video-tape revealed that this wheelchair was capable of rapid movement and that it was highly maneuverable.

34. The lecture was delivered in a wholly confrontational and offensive manner. The lecture continued for more than 30 minutes. This behavior was the opposite of the de-escalating behavior that is suggested by CPI. However, Dr. Whalen had never been directed to employ CPI.

35. S.O. was a student in Dr. Whalen's class and was present on November 20, 2002. He was a student of the Caucasian race who had, prior to this date, displayed aggressive and violent behavior toward Assistant Principal Verges and toward Ruth Ann Austin, Dr. Whalen's aide. Some on the school staff described him, charitably, as "non-compliant."

36. S.O. was quick to curse and had in the past, directed racial slurs to Ms. Austin, who is an African-American. Because of his propensity to kick those to whom his anger was directed, his parents had been requested to ensure that he wear soft shoes while attending school.

37. On November 20, 2002, S.O. was wearing cowboy boots and a Dixie Outfitters shirt with the Confederate battle flag emblazoned upon the front. Subsequent to Dr. Whalen's tirade, S.O. slid out of his chair onto the carpeted floor of the classroom. Dr. Whalen instructed him to get back in his chair,

and when he did not, she tried to force him into the chair. She threatened S.O. by saying, "Do you want to do the floor thing?"

38. When S.O., slid out of his chair again, Dr. Whalen forcibly removed S.O.'s jacket. Thereafter, Ms. Austin approached S.O. Ms. Austin is a large woman. Ms. Austin removed S.O.'s watch and yanked S.O.'s boots from his feet and threw them behind his chair. Dr. Whalen drove her wheelchair into the back of S.O.'s chair with substantial violence. Thereafter, Ms. Austin removed S.O. from the classroom.

39. Removing S.O.'s jacket, watch, and boots was acceptable under the circumstances because they could have been used as weapons. The act of driving the wheelchair into the back of S.O.'s chair, however, was unnecessary and unhelpful.

40. A memorandum of counseling was presented to Dr. Whalen by Principal Ivey on December 2, 2002, which addressed her behavior as portrayed by the video-tape.

#### The S.O. and C.C. incidents

41. Reports from time to time were made to Assistant Principal Verges, and others, that Dr. Whalen engaged in an activity commonly referred to as "kissing the carpet." This referred to physically taking children down to the floor and sitting on them.

42. During April 2003, Dr. Whalen reported to Assistant Principal Verges and Ms. Kriedler that she had recently put two

students on the carpet. During the four years Mr. Verges was Dr. Whalen's Assistant Principal, Dr. Whalen reported a total of only about four instances of having to physically restrain students. Dr. Whalen has never told Mr. Verges that she has regularly restrained children on the floor.

43. Dr. Whalen's agent for using physical restraint is her aide, Ms. Austin, because Dr. Whalen's handicap does not permit her to easily engage in physical restraint. Ms. Austin physically restrained children five or six or seven times during the four years she was Dr. Whalen's aide. On four occasions a child actually went to the floor while being restrained by Ms. Austin.

44. One of the two students who were reported to have been physically restrained during the April 2003, time frame was S.M.

45. During this time frame S.M. became a new student in Dr. Whalen's class. S.M. was unhappy about being placed in a "slow" class.

46. It was Ms. Austin's practice to meet Dr. Whalen's students when they exited the school bus in the morning. Accordingly, she met S.M., the new student. S.M. was "mouthy" when she exited the bus and would not get in line with the other children.

47. S.M. and the rest of the children were taken to the lunch room in order to procure breakfast. While there, S.M.

obtained a tray containing peaches and other food and threw the contents to the floor. Ms. Austin instructed S.M. to clean up the mess she made. S.M. responded by pushing Ms. Austin twice, and thereafter Ms. Austin put S.M. in a basket hold. S.M. struggled and they both fell on the floor. Ms. Austin called for assistance and someone named "Herb" arrived. Herb put a basket hold on S.M. while Ms. Austin tried to remove S.M.'s boots because S.M. was kicking her. S.M. was almost as tall as Ms. Austin and was very strong.

48. At the end of the day, Ms. Austin was trying to "beat the rush" and to get her students on the school bus early. She was standing in the door to the classroom attempting to get her students to form a line. She and Dr. Whalen had planned for S.M., and another student, with whom she had engaged in an ongoing disagreement, to remain seated while the rest of their classmates got on the bus. While the line was being formed, S.M. and her fellow student had been directed to sit still.

49. Instead, S.M. rose, said that she was not going to wait, and tried to push by Ms. Austin. Ms. Austin responded by asking her to sit down. S.M. said she would not sit down and pushed Ms. Austin yet again. Ms. Austin tried to restrain her and told the other students to get to the bus as best as they could because she was struggling with S.M. and was having substantial difficulty in restraining her.



50. Ms. Austin asked for help. She and S.M. fell to the floor. S.M. was on the carpet. Dr. Whalen slid from her wheelchair and attempted to restrain the top part of S.M.'s body. Ms. Austin held the bottom part of her body and attempted to remove her boots with which S.M. was kicking. S.M. was cursing, screaming, and otherwise demonstrating her anger.

51. Dr. Whalen talked to her until she calmed down. They then released S.M. The actions taken by Ms. Austin and Dr. Whalen were appropriate responses to S.M.'s behavior.

52. The S.M. affair precipitated the C.C. incident. C.C. was a large male student who had no history of violence. C.C. teased S.M. about having been "taken down" by Ms. Austin. C.C., teasingly, told Ms. Austin, that he did not think Ms. Austin could take him down. Ms. Austin said she could put him in a basket hold which she did. C.C. challenged Ms. Austin to put him on the floor and she did. This was considered a joke by C.C. and Ms. Austin. This incident was nothing more than horseplay.

53. As the result of the comments made by Dr. Whalen, addressing the S.M. and C.C. incidents, to Ms. Kriedler and to Assistant Principal Verges, a memorandum issued dated April 7, 2003. It was signed by Principal Sylvia Ivey.

54. The memorandum recited that Dr. Whalen's comments raised concerns with regard to whether Dr. Whalen was using

appropriate CPI techniques. The memorandum stated that Dr. Whalen's classroom would be video-taped for the remainder of the school year, that Dr. Whalen was to document each case of restraint used, that she should use proper CPI techniques, and that she should contact the office should a crisis situation arise in her classroom.

#### The J.R. incident

55. On January 19, 2005, J.R. was a student in Dr. Whalen's classroom. On that date, J.R. was a ten-year-old female and in the third grade. J.R. had been a student in Dr. Whalen's classroom only since about January 10, 2005.

56. Dr. Whalen did not know much about J.R.'s history on January 19, 2005. At the hearing J.R. appeared physically to be approximately as large as Dr. Whalen. A determination as to exactly who was the larger could not be made because Dr. Whalen was seated in a wheelchair.

57. Assistant Principal Verges found that J.R.'s physical strength was greater than average for an elementary school student on an occasion when he had to restrain her after she bit another person.

58. J.R. brought a CD player to class on January 19, 2005, and after lunchtime, Dr. Whalen discovered it and confiscated it. Dr. Whalen took possession of the CD player because school

rules forbid students to have CD players in class. Dr. Whalen put it in a drawer by her desk. When this happened, in J.R.'s words she, "Got mad."

59. A heated discussion between Dr. Whalen and J.R., about the dispossession of the CD player ensued, but after a brief time, according to Dr. Whalen's aide, Angela Watford, "the argument settled." Even though Ms. Watford's lunch break had begun, she remained in the room, at Dr. Whalen's request, until she was satisfied that the dispute had calmed.

60. Subsequent to the departure of Ms. Watford, J.R. approached Dr. Whalen, who was seated behind her desk working. The configuration of the desk and furniture used by Dr. Whalen was such that she was surrounded by furniture on three sides. In order to obtain the CD player, it was necessary for J.R. to enter this confined space. J.R. entered this space, moving behind Dr. Whalen, and reached for the drawer containing the CD player in an effort to retrieve it. When Dr. Whalen asked her what she was doing, J.R. said, "I am getting my CD player and getting out of this f \_ \_ \_ \_ \_ \_ class."

61. Dr. Whalen told J.R. to return to her desk. J.R. continued in her effort to obtain the CD player and succeeded in opening the drawer and grasping the headset part of the CD player. Dr. Whalen attempted to close the drawer. J.R. reacted violently and this surprised Dr. Whalen. J.R. attempted to

strike Dr. Whalen. Dr. Whalen reared back to avoid the blow and then put her arm around J.R. When J.R. pulled away, this caused Dr. Whalen to fall from her wheelchair on top of J.R.'s back at about a 45-degree angle.

62. Immediately thereafter, J.R. bit Dr. Whalen several times. The bites broke Dr. Whalen's skin in three places and the pain caused her to cry. J.R. began cursing, screaming, and kicking. J.R. said she was going to "kick the s \_ \_ \_" out of her teacher. In fact, while on the carpet, J.R. kicked Dr. Whalen numerous times. Dr. Whalen believed she would be in danger of additional harm if she allowed J.R. to regain her feet. This belief was reasonable. J.R. was in no danger of asphyxiation during this event because Dr. Whalen removed part of her weight from J.R. by extending her arms.

63. Upon returning from lunch Ms. Watford spotted T.B., a boy who appears to be eight to ten years of age. T.B. was standing outside of Dr. Whalen's classroom and he calmly said to Ms. Watford, "Help."

64. Ms. Watford entered the classroom and observed Dr. Whalen lying on top of and across J.R., who was face down on the carpeted floor, and who was cursing and kicking while Dr. Whalen tried to restrain her. Ms. Watford ran over to assist in restraining her by putting her legs between J.R.'s legs. J.R. thereafter tried to hit Ms. Watford with her right

hand. Ms. Watford grabbed J.R.'s right arm and was severely bitten on the knuckle by J.R. The three of them ended up, Ms. Watford related, "in a wad."

65. Within seconds of Ms. Watford's intervention, Frances Durden, an aide in the classroom next door came on the scene. She was followed by Takeisha McIntyre, the dean of the school, and Assistant Principal Verges. Ms. McIntyre and Mr. Verges were able to calm J.R. and safely separate her from Dr. Whalen.

66. Then J.R. stated that Dr. Whalen had bitten her on the back.

67. Dr. Whalen and Ms. Watford went to the school's health clinic to have their wounds treated. The wounds were cleaned and Ms. Watford subsequently received an injection.

68. While Dr. Whalen and Ms. Watford were at the health clinic, J.R. was ushered in by Ms. McIntyre. J.R.'s shirt was raised and the persons present observed two red marks between her shoulder blades.

69. Dr. Whalen said that the marks must have been produced by her chin or that possibly her teeth may have contacted J.R.'s back. She said that she had forced her chin into J.R.'s back in an effort to stop J.R. from biting her. Ms. McIntyre took photographs of the marks. The photography was observed by Mr. Verges.

70. The photographs reveal two red marks positioned between J.R.'s shoulder blades. The two marks are vertical, parallel, and aligned with the backbone. They are from one, to one and one half inches in length. The skin is not broken. There is no wound. Teeth marks are not discernible.

71. A teacher who has many years of experience in the elementary or kindergarten education levels, and who has observed many bite marks, may offer an opinion as to whether a mark is a bite mark. Mr. Verges has the requisite experience to offer an opinion as to the nature of the marks on J.R.'s back and he observed the actual marks as well as the photographs. It is his opinion that the two marks were caused by a bite. Ms. McIntyre, who has also observed many bite marks in her career, and who observed the actual marks as well as the photographs, stated that the marks were consistent with a bite. Registered Nurse Cate Jacob, supervisor of the School Health Program observed Julia's back on January 19, 2005, and opined that the red marks on J.R.'s back were bite marks.

72. J.R. reported via her mother, the day after the incident, that she had been bitten by a boy on the playground of Taylor Elementary School, by a black boy with baggy pants, possibly before the incident with Dr. Whalen. Facts presented

at the hearing suggest that it is unlikely that J.R. was bitten on the playground under the circumstances described in this report.

73. T.B. was the only nonparticipant close to the actual combat who was a neutral observer. He did not see Dr. Whalen bite J.R., but did see her chin contact J.R.'s back and he heard Dr. Whalen say words to the effect, "I am going to make you say 'ouch.'"

74. Dr. Whalen denied biting J.R. She stated at the time of the event, and under oath at the hearing, that she forcibly contacted J.R.'s back with her chin. She stated that it was possible that in the heat of the struggle her teeth may have contacted J.R.'s back.

75. The opinion of the school personnel as to the origin of the marks upon J.R.'s back is entitled to great weight. On the other hand, a study of the photographs exposed immediately after the incident, reveals no teeth marks and no broken skin. The marks could be consistent with pressing one's chin upon another's back or pressing one's teeth in one's back. In the latter case, whether J.R. was bitten may be a matter of definition. Generally, a bite occurs when the victim experiences a grip or would like that experienced by Ms. Watford or Dr. Whalen in this incident. Although J.R. asserted that the marks occurred because of the actions of, "a boy on the

playground," given J.R.'s general lack of credibility, that explanation is of questionable reliability.

76. The evidence, taken as a whole, does not lend itself to a finding of the origin of the marks on J.R.'s back. Because proof by clear and convincing evidence is required in this case, it is not found that Dr. Whalen bit J.R.

77. Principal Ivey's memorandum of April 7, 2003, specified that ". . . Mr. Howard and I informed you that we will video-tape your classroom . . . ." Thus it is clear that it was not Dr. Whalen's duty to cause the classroom to be video-taped. It is clear that for many months Dr. Whalen's classroom was video-taped and until the November 20, 2003, incident, none of her actions caused attention to be drawn to her teaching methods.

78. It is found that the assault on Dr. Whalen was sudden and unexpected. Any actions taken by Dr. Whalen were taken in permissible self-defense.

79. J.R. was suspended from Taylor Elementary School for ten days following this incident.

#### Miscellaneous Findings

80. Sylvia Ivey has been the principal of Taylor Elementary for three years. She has evaluated Dr. Whalen three times. She has evaluated Dr. Whalen as "effective," which is the top mark that a teacher may receive.



81. From approximately 1997, when the S.A. hair pulling allegedly occurred, until December 2, 2002, not a single document was created indicating dissatisfaction with Dr. Whalen's teaching methods.

82. Dr. Whalen's normal voice volume is louder than average. She would often elevate her already loud voice, intimidate students and pound on her desk. The aforementioned activities are not part of CPI. On the other hand, these methods worked for Dr. Whalen for 20 years. She was not required to use CPI until subsequent to the memorandum of April 7, 2003. There is no evidence that she failed to use CPI once she was required to employ it.

83. As revealed by the testimony of Dr. Whalen, Ms. Kriedler, Assistant Principal Verges, Ms. Austin, and others, some of these children would strike, kick, bite, throw objects, curse, and hurl racial epithets at their teachers. Teaching some of these children was difficult.

#### CONCLUSIONS OF LAW

84 The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat.

85. The Commissioner has the burden of proving by clear and convincing evidence the factual allegations set forth in the

Second Amended Administrative Complaint. Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

86. Clear and convincing evidence is that which is credible, precise, explicit, and lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier-of-fact the firm belief of conviction, without hesitancy, as to the truth of the allegations. Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).

87. The grounds established to support imposition of disciplinary action against Dr. Whalen's educator's certificate must be those specifically alleged in the Second Amended Administrative Complaint. Cottrill v. Department of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996) and Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2d DCA 1984).

88. Becoming a teacher does not deprive a person of the right to defend herself. There is nothing in the Florida K-20 Education Code which deprives a teacher of the right to defend herself. Section D of Article VII of the Master Teacher Contract entered into by the School Board and the Taylor Education Association, provides that "an employee may use such force as is deemed reasonable in protection from attack . . . ."

89. Section 1012.795 provides as follows:

(1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for a period of time not to exceed 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for a period of time not to exceed 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon order of the court, of any person found to have a delinquent child support obligation; or may impose any other penalty provided by law, provided it can be shown that the person:

\* \* \*

(c) Has been guilty of gross immorality or an act involving moral turpitude.

\* \* \*

(f) Upon investigation, has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board.

\* \* \*

(i) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

90. Count 1 alleges that Dr. Whalen is in violation of Section 1012.795(1)(c), to wit: gross immorality or an act involving moral turpitude.

91. With regard to Count 1, Florida Administrative Code Rule 6B-4.009(6), provides as follows:

(6) Moral turpitude is a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude.

92. Nothing proven rises to the serious level required to prove an act of moral turpitude. Accordingly, the allegations of Count 1 should be dismissed.

93. Count 2 alleges a violation of Section 1012.795(1)(f), to wit: engaging in personal conduct which seriously reduces her effectiveness as an employee of the School Board. No evidence was adduced which proves that Dr. Whalen's effectiveness has been reduced. She has been consistently rated as "effective." Count 2 should be dismissed.

94. Count 3 alleges a violation of Section 1012.795(1)(i), to wit: violating the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education

rules. These rules are specifically addressed in Counts 4 through 9. As will be discussed herein, Dr. Whalen violated the rule set out in Count 4, and is thus, also guilty of Count 3.

95. Count 4 alleges a violation of Florida Administrative Code Rule 6B-1.006(3)(a) to wit: failing ". . . to make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental health and/or physical health and/or safety. Dr. Whalen, on November 20, 2002, intentionally and forcefully rammed her motorized wheelchair into the back of S.O.'s chair, while he was, more or less, in the chair, and therefore did not protect her student's physical safety. Although there is no evidence that S.O. was injured, he could have been.

96. Count 5 alleges a violation of Florida Administrative Code Rule 6B-1.006(3)(c) to wit: unreasonably denying a student access to diverse points of view. This count was not proven and should be dismissed.

97. Count 6 alleges a violation of Florida Administrative Code Rule 6B-1.006(3)(e) to wit: intentionally exposing a student to unnecessary embarrassment or disparagement. The lecture delivered and captured on the video-tape made November 20, 2002, was loud and unnecessarily long. No evidence was adduced tending to demonstrate that there was any intent to

embarrass a student and there was no evidence adduced that any student was embarrassed. This allegation was not proven.

98. Count 7 alleges a violation of Florida Administrative Code Rule 6B-1.006(3)(i) to wit: failing to keep in confidence personally identifiable information obtained in the course of professional services, unless disclosure serves professional purposes or is required by law. This Count addresses the release of the video-tape to a parent.

99. Neither the Second Amended Administrative Complaint, nor Petitioner's Proposed Recommended Order, identifies any statute that might make providing a video-tape of class activities to a parent confidential. Section 1022.22(3) provides parents with access to certain documents, and this arguably includes video-tapes of classroom proceedings. Records with more than one student's information require redaction. How this is to be done where the record is a video-tape is not revealed.

100. Florida Administrative Code Rule 6A-1.0955, Education Records of Pupils and Adults, which has not been amended since the Florida K-20 Education Code was enacted, does not illuminate whether the release of a video-tape to a parent is permissible. Whether or not this is a school record that can be made subject to confidentiality statutes is questionable. See Owasso

(2002).

101. This violation is insufficiently alleged in that it does not identify the law or rule prohibiting the release of classroom video-tapes. Count 7 should be dismissed.

102. Count 8 alleges a violation of Florida Administrative Code Rule 6B-1.006(4)(b) to wit: intentionally distorting or misrepresenting facts concerning an educational matter in direct or indirect public expression.

103. Florida Administrative Code Rule 6B-1.006(4)(b) provides as follows:

(4) Obligation to the public requires that the individual:

\* \* \*

(b) Shall not intentionally distort or misrepresent facts concerning an educational matter in direct or indirect public expression.

104. There is no evidence of record to support this allegation and therefore, Count 8 should be dismissed.

105. Count 9 alleges a violation of Florida Administrative Code Rule 6B-1.006(5)(a) to wit: failing to maintain honesty in all dealings.

106. Florida Administrative Code Rule 6B-1.006(5)(a) provides as follows:

Obligation to the profession of education requires that the individual:

(a) Shall maintain honesty in all professional dealings.

107. No evidence was adduced which demonstrates that Dr. Whalen violated Florida Administrative Code Rule 6B-1.006(5)(a). Accordingly, Count 9 should be dismissed.

108. In summary, the evidence proved Counts 3 and 4, in that Dr. Whalen violated Section 1012.795(1)(i), as elucidated by Florida Administrative Code Rule 6B-1.006(3)(a). These offenses are multiplicitous for purposes of determining a penalty.

109. Florida Administrative Code Rule 6B-11.007(2)(j), provides as follows:

(2) The following disciplinary guidelines shall apply to violations of the below listed statutory and rule violations and to the described actions which may be basis for determining violations of particular statutory or rule provisions. Each of the following disciplinary guidelines shall be interpreted to include "probation" with applicable terms thereof as an additional penalty provision.

\* \* \*

(j) Misuse of corporal punishment/Inappropriate methods of discipline in violation of S. 231.28[now 1012.795(1)(i)],(1)(b), (c), (f), (i), F.S., Rule 6B-1.006(3)(a), (e)--Revocation to reprimand.



110. Florida Administrative Code Rule 6B-11.007(2)(j), provides for mitigating and aggravating factors to be considered when assessing a penalty, as follows:

(3) Based upon consideration of aggravating and mitigating factors present in an individual case, the Commission may deviate from the penalties recommended in subsection (2). The Commission may consider the following as aggravating or mitigating factors:

- (a) The severity of the offense;
- (b) The danger to the public;
- (c) The number of repetitions of offenses;
- (d) The length of time since the violation;
- (e) The number of times the educator has been previously disciplined by the Commission;
- (f) The length of time the educator has practiced and the contribution as an educator;
- (g) The actual damage, physical or otherwise, caused by the violation;
- (h) The deterrent effect of the penalty imposed;
- (i) The effect of the penalty upon the educator's livelihood;
- (j) Any effort of rehabilitation by the educator;
- (k) The actual knowledge of the educator pertaining to the violation;
- (l) Employment status;
- (m) Attempts by the educator to correct or stop the violation or refusal by the licensee to correct or stop the violation;
- (n) Related violations against the educator in another state including findings of guilt or innocence, penalties imposed and penalties served;
- (o) Actual negligence of the educator pertaining to any violation;
- (p) Penalties imposed for related offenses under subsection (2) above;
- (q) Pecuniary benefit or self-gain enuring to the educator;

- (r) Degree of physical and mental harm to a student or a child;
- (s) Present status of physical and/or mental condition contributing to the violation including recovery from addiction;
- (t) Any other relevant mitigating or aggravating factors under the circumstances.

111. Dr. Whalen rammed her wheelchair into the back of S.O.'s chair and that is a severe offense although no personal injury was proven to have been sustained by the victim. It is also the single offense proven and it occurred recently. Dr. Whalen has never been disciplined by the Commission in the more than 20 years she has been an educator.

112. Dr. Whalen is a handicapped person, and if she is denied the opportunity to continue teaching she will be financially devastated. She has willingly and enthusiastically taught "varying exceptionalities" classes, which are more difficult than teaching classes of ordinary students.

#### RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law,  
it is

RECOMMENDED that Respondent be found guilty of Counts 3 and 4, that she be issued a reprimand, that she be placed on probation as that term is defined in Florida Administrative Code Rule 6B-11.008, for a period of one year.

DONE AND ENTERED this 15th day of June, 2005, in  
Tallahassee, Leon County, Florida.

**S**

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Filed with the Clerk of the  
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this 15th day of June, 2005.

COPIES FURNISHED:

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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.