

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TAYLOR COUNTY SCHOOL BOARD,            )  
                                                  )  
          Petitioner,                        )  
                                                  )  
vs.                                            )     Case No. 05-0759  
                                                  )  
NATALIE WAHLEN,                         )  
                                                  )  
          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 Taylor County School Board:

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For Respondent: Mary Aspros, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether Respondent's employment with the District School Board of Taylor County, Florida, should be terminated.

PRELIMINARY STATEMENT

On January 19, 2005, Petitioner, District School Board of Taylor County, Florida (School Board or District), suspended Dr. Natalie Whalen (Dr. Whalen) with pay because of an incident occurring in her classroom on that day. In a letter dated January 27, 2005, Oscar Howard, Jr., Superintendent of Schools, informed Dr. Whalen that he intended to recommend to the School Board that her employment be terminated based on the January 19, 2005, incident. The letter stated that instructions given on April 7, 2003, would be considered in the decision to terminate employment.

In a letter dated January 28, 2005, through her attorney, Dr. Whalen demanded a formal administrative hearing. The demand for a hearing was forwarded to the Division of Administrative Hearings and filed February 28, 2005. The hearing was set for May 3 and 4, 2005, and heard in Perry, Florida, as scheduled.

This case was tried in conjunction with Case Number 04-2166PL, which was an action against Dr. Whalen brought by the Florida Commissioner of Education (Commissioner) before the Education Practices Commission.

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.

The only evidence considered in this case is evidence relevant to the intended action of the School Board.

A Transcript was filed on May 20, 2005. After the hearing, Respondent filed her Proposed Recommended Order on May 31, 2005, and Petitioner filed its Proposed Recommended Order on June 3, 2005, subsequent to an order permitting an enlargement of time.

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

#### FINDINGS OF FACT

1. The School Board has employed Dr. Whalen since 1997. She was, when first employed, a teacher at Gladys Morse Elementary School and then was employed as a teacher at Taylor Elementary School. Until January 19, 2005, she taught at Taylor Elementary School. Her employment was pursuant to a professional services contract.

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 have a physical handicap or handicaps. 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 County Coordinator for the Special Olympics.

4. The School Board operates the school system in Taylor County. The School Board is a party to a Master Teacher Contract (Master Teacher Contract), with The Taylor Education Association, which is an affiliate of the Florida Education Association, the American Federation of Teachers, the AFL-CIO, and the National Education Association. This contract governs the relations between teachers, and others, and the School Board. Accordingly, it governs the relations between the School Board and Dr. Whalen.

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 Crises 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.

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, the act of lying upon a child could prevent a child from breathing which could result in injury or death.

11. Ms. Kriedler teaches CPI throughout the District. 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.

13. A memorandum dated April 7, 2003, and signed by Principal Sylvia Ivey, was presented to Dr. Whalen by Principal Ivey. The memorandum addressed conversations that Dr. Whalen had with two of her colleagues on April 3, 2003. The memorandum recited that these conversations 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.

14. The record reveals that Dr. Whalen's classroom was already being video-taped as early as November 20, 2002. It is certain that the classroom was being video-taped daily from April 2003, until the end of the school year. By January 2005 the practice of video-taping Dr. Whalen's classroom on a daily basis had ended. The incident giving rise to this case was not video-taped.

15. 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.

16. During January 2005, a school resource officer, who is a deputy sheriff, was available should it become necessary to physically restrain a child who was a threat to himself or herself or others.

17. On January 19, 2005, J.R. a female, was a student in Dr. Whalen's classroom. J.R. was ten years old and in the third grade. J.R. had been a student in Dr. Whalen's classroom since about January 10, 2005. 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 at the hearing. Assistant Principal Verges found that J.R.'s physical strength was greater than average for an elementary school student when once he had to restrain her after she bit another person.

18. J.R. brought a CD player to class on January 19, 2005, and after lunchtime, Dr. Whalen discovered the CD player 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."

19. 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.

20. 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."

21. 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.

22. 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.

23. 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."

24. 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."

25. 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 Vincent Verges. Ms. McIntyre and Mr. Verges were able to calm J.R. and safely separate her from Dr. Whalen.

26. Then J.R. stated that Dr. Whalen had bitten her.

27. 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.

28. 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.

29. 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.

30. The photographs reveal two red marks positioned between J.R.'s shoulder blades. The two marks are vertical 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.

31. A teacher who has 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 J.R.'s back on January 19, 2005, and opined that the red marks on J.R.'s back were bite marks.

32. 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 under the circumstances described.

33. 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.'"

34. 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.

35. 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 are 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 wound 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.

36. The evidence, taken as a whole, does not lend itself to a finding as to the origin of the marks on J.R.'s back.

37. 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.

38. It is found that the assault on Dr. Whalen was sudden and unexpected.

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

40. 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. Dr. Whalen received memoranda of counseling on December 2, 2002, and April 7, 2003.

## CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.57(1) and 1012.33(3)(e) and (f). See also Section S.2 of the Master Teacher Contract.

42. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal, Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). To meet this burden, the School Board must establish facts upon which its allegations of misconduct are proven by a preponderance of the evidence. Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3rd DCA 1990) and Sublett v. Sumter County School Board, 664 So. 2d 1178 (Fla. 5th DCA 1995). See also § 120.57(1)(j).

43. Section 1012.33(1)(a), provides that a teacher, such as Dr. Whalen, who has entered into a professional services contract may be dismissed only for just cause. This is reiterated in Section S.2 of the Master Teacher Contract.

44. Section 1012.33(1)(a) defines just cause as misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude, and states that these five reasons may be defined by rule of the State Board of Education.

45. The State Board of Education has provided definitions for the four of the five terms (willful neglect of duty is not specifically defined), along with some obsolete terms (which are not included below), in Florida Administrative Code Rule 6B-4.009, as follows:

6B-4.009. Criteria for Suspension and Dismissal.

The basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36, Florida Statutes. The basis for four of the five charges (willful neglect of duty is not included in the rule) is hereby defined:

(1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis of testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on a preponderance of evidence showing the existence of one (1) or more of the following:

(a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, Florida Statutes; (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum educational experience; or (3) repeated failure on the part of an administrator or supervisor to communicate with and relate to teachers under his or her supervision to such an extent that the educational program for which he or she is responsible is seriously impaired.

(b) Incapacity: (1) lack of emotional stability; (2) lack of adequate physical ability; (3) lack of general educational background; or (4) lack of adequate command of his or her area of specialization.

\* \* \*

(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, FAC., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, FAC., which is so serious as to impair the individual's effectiveness in the school system.

(4) Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

\* \* \*

(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.

46. The letter dated January 27, 2005, which informs Dr. Whalen that a recommendation of termination will be made to the School Board, and which is the charging document in this case, does not inform as to what specific rule has been violated. It alleges two impermissible activities: (1) failing



to contact the school office for assistance until after the J.R. incident escalated into a physical confrontation and (2) causing the J.R. situation to escalate.

47. Failing to contact the school office for assistance until the J.R. incident escalated into a physical confrontation should be analyzed under Florida Administrative Code Rule 6B-4.009(4), because a failure to follow instructions is alleged.

48. For this action to be just cause, the insubordination must be a constant or continuing intentional refusal to obey a direct order that is reasonable in nature. The only order allegedly not obeyed was the order to contact the office in case of a crisis. The letter recites one occurrence. A single failure cannot be constant or continuing. Moreover, under the circumstances, obedience could not have been reasonable. The attack on Dr. Whalen was sudden. It was not foreseeable. Thus, it is unreasonable to expect Dr. Whalen to have summoned assistance.

49. The allegation that Dr. Whalen caused the J.R. situation to escalate, alleges misconduct in office. In order to define misconduct in office, it is necessary, according to Florida Administrative Code Rule 6B-4.009(3), to refer to Florida Administrative Code Rules 6B-1.001 and 6B-1.006.

50. Florida Administrative Code Rule 6B-1.001, provides as follows:

6B-1.001. Code of Ethics of the Education Profession in Florida.

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(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.

51. Florida Administrative Code Rule 6B-1.001, uses the words "seek" and "strive" and is, therefore, aspirational and does not provide for the specificity required to find just cause to terminate or impose any discipline

52. Florida Administrative Code Rule 6B-1.006, provides in 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.

53. Upon reviewing the three subparagraphs recited above it is determined that Dr. Whalen's actions on January 19, 2005, did not violate any of them.

54. Article VII of the Master Teacher Contract, in the first paragraph, recites: "The Board recognizes the necessity for provision of measured [sic] to ensure both the authority and personal protection of each member of the instructional . . . staff." A teacher must have the authority necessary to control her classroom, and this is provided by the Master Teacher Contract.

55. The unrebutted testimony of Dr. Whalen proved that school policy did not permit CD players to be possessed by students in the classroom. It was reasonable for Dr. Whalen to confiscate J.R.'s CD player and to place it in one of her drawers. Dr. Whalen had the authority to do this.

56. Section D of Article VII of the Master Teacher Contract provides that "an employee may use such force as is deemed reasonable in protection from attack. . . ." Dr. Whalen's reaction to J.R.'s assault was reasonable. Under the circumstances, Dr. Whalen used remarkable restraint.

RECOMMENDATION

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

RECOMMENDED that Dr. Whalen be immediately reinstated to her former position without diminution of pay or benefits, pursuant to the Master Teacher Contract.

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

**S**

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HARRY L. HOOPER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
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.