STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SCHOOL BOARD, Petitioner, vs. MARK C. FRONCZAK, Respondent.	))))))))))	Case No. 06-0331

RECOMMENDED ORDER

Pursuant to notice, a hearing was held on May 9 and 10, 2006, in Largo, Florida, before Carolyn S. Holifield, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David A. Koperski, Esquire
Laurie Dart, Esquire
Pinellas County School Board
Post Office Box 2942
Largo, Florida 33779-2942

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 110
Clearwater, Florida 33761

STATEMENT OF THE ISSUES

Whether Respondent engaged in the misconduct alleged in the charging document; and, if yes, whether such offenses are violations of Pinellas County School Board Policy 8.25 and the

Code of Professional Conduct and/or constitute "just cause" for his dismissal as a teacher in the Pinellas County School District.

PRELIMINARY STATEMENT

By letter dated May 30, 2004, the superintendent of Pinellas County Schools advised Respondent, Mark Fronczak (Respondent), that he was recommending to the Pinellas County School Board (School Board or Pinellas County School Board) that Respondent be dismissed from his employment. The basis for the recommendation was Respondent's having been arrested on April 28, 2004, and subsequently charged with capital sexual battery and lewd and lascivious behavior on a child. Respondent requested a formal hearing to challenge the recommendation. Pending the outcome of the administrative proceeding, Respondent was suspended without pay by the School Board.

The School Board forwarded the matter to the Division of Administrative Hearings on January 26, 2006, after Respondent was tried in criminal court on the charges noted in the attachment to the above-referenced May 30, 2004, letter.

By Notice issued February 8, 2006, the final hearing was set for April 10 through 12, 2006. Subsequently, at the request of the parties, the hearing was continued and was rescheduled and held as noted above.

At hearing, Petitioner presented the testimony of eight witnesses. Respondent testified on his own behalf and presented the testimony of ten witnesses. The parties' Joint Exhibit 9 and Petitioner's Exhibits 1, 2, and 4 through 8 were admitted into evidence. Prior to the hearing, the parties filed a Pre-Hearing Stipulation in which they stipulated to certain facts that required no proof at hearing.

A Transcript of the hearing was filed on June 2, 2006. Respondent requested and the parties were granted an extension of time in which to file proposed recommended orders. Petitioner and Respondent filed Proposed Recommended Orders on June 14, 2006, and June 15, 2006, respectively. Both Proposed Recommended Orders have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, the Pinellas County School Board, operates the public schools in Pinellas County, Florida.

2. Respondent has been a teacher for 25 years. The last 18 years, he has worked as a music teacher in the Pinellas County schools. From 1986 to 1993, Respondent taught music at Dixie Hollins High School. From about August 1993 until about April 28, 2004, Respondent worked as a music teacher at Southern Oak Elementary School (Southern Oak). Respondent transferred to Southern Oak because his two sons were attending school there.

3. At all times relevant to this proceeding, Respondent taught music to students in kindergarten through fifth grade at Southern Oak. The classroom teachers brought their classes to the music room where Respondent taught music and returned to pick up the students at or near the time the music class was over.

4. The music room at Southern Oak was a large room, which included the open area where the students sat during their music class. In addition to the area where Respondent taught the various classes, the music room also included an office, a practice room, and three storage rooms. The music room had several large windows facing outside.

5. As part of the music classes, Respondent worked with the children on rhythm movement, singing, playing instruments, and active listening, where the children were asked to keep the beat of the music that was playing on either the television or compact disc player.

6. In the 2003-2004 school year, Respondent used a music curriculum that was about two years old. This music curriculum included a variety of videos and lessons. As part of his teaching and implementation of this curriculum, Respondent showed these curriculum-related videos to the students in his music classes.

7. During the 2003-2004 school year, C.L., St.H., and Sa.H. were students at Southern Oak. C.L. was seven years old in second grade. St.H. and Sa.H., who are sisters, were about seven years old and in first grade. Like all other students at Southern Oak, C.L., St.H., and Sa.H. went to Respondent for music.

8. C.L., St.H., and Sa.H. were all in different classes and, therefore, they did not attend music class during the same class period. Rather, they went to music with their respective classes at the time scheduled.

9. At all times relevant to this proceeding, C.L. did not know either St.H. or Sa.H. Also, at all times relevant to this proceeding, neither St.H. nor Sa.H. knew C.L.

Situation Related to C.L.

10. On December 1, 2003, while C.L. was in the tub, her mother, Ms. L., picked up C.L.'s panties from the floor and noticed that there was blood in the panties. Ms. L. asked C.L. questions about the blood, but C.L. could not say when the bleeding had started.

11. The following day, Ms. L. took C.L. to see Jeanette Moss, M.D. She also took two pairs of C.L.'s panties to the doctor's office to show the doctor. Because Ms. L. first discovered the blood in C.L.'s panties on December 1, 2003, she did not know and, thus, could not state with absolute certainty

when this episode of bleeding began. However, Dr. Moss' medical report for that office visit indicated that C.L. was brought in by her mother because of suspected vaginal bleeding for the last five days.

12. Dr. Moss did not conduct a vaginal examination, but looked in C.L.'s vaginal area to see if there was still bleeding and determined that there was not. Dr. Moss inquired about the possibility of sexual abuse, but Ms. L. did not think this was possible because she believed that C.L. was always properly supervised.

13. After December 1, 2003, Ms. L. became aware that C.L. had two more episodes of bleeding, one in early January 2004 and one in late January or early February 2004. Following the early January 2004 episode, Ms. L. took C.L. to a medical office, where a nurse, Rene Nolan, looked at C.L.'s vaginal area, but did not conduct a vaginal examination. At the time of this visit, there was no bleeding. Nurse Nolan asked Ms. L. about the possibility of sexual abuse. Still, Ms. L. did not believe this was possible.

14. Following the episode of bleeding in late January or early February 2004, C.L. was referred to Dr. Diamond, an endocrinologist. Dr. Diamond saw C.L. in April 2004 and reported to Ms. L. that there was no indication that the bleeding was related to puberty. With Ms. L.'s permission and

in her presence, Dr. Diamond looked at C.L.'s vaginal area and, based on that observation, reported to Ms. L. that the vaginal opening "was not right for a seven-year-old" and indicated he believed there was some kind of sexual abuse. He told the mother to call the Child Protective Team (Child Protective Team or CPT) and have a full examination done.

15. Ms. L. contacted the Child Protective Team the day after she and C.L. went to Dr. Diamond's office, but was told that a police report had to be filed before an examination could be performed. Since C.L. had denied that anything inappropriate had happened, Ms. L. was reluctant to file a police report.

16. Ms. L. contacted Nurse Nolan and shared her concerns about filing a police report. She also updated Nurse Nolan about what had been happening with C.L. since the January 2004 office visit. Nurse Nolan then referred Ms. L. to Dr. Cheek, a physician who had previously worked with the Child Protective Team.

17. On or about April 16, 2004, C.L. was examined by Dr. Cheek. After examining C.L., Dr. Cheek told Ms. L. that she was able to see C.L.'s hymen and determined that there was missing tissue, and there was also scar tissue. Dr. Cheek told Ms. L. that she suspected some type of abuse and reported her suspicion to the child abuse authorities.

18. On or about April 20, 2004, a nurse practitioner with the Child Protective Team conducted a full examination of C.L. That examination, like the one performed by Dr. Cheek, showed loss of hymenal tissue and scarring. The medical record, completed by the nurse practitioner, stated that the loss of hymenal tissue with scarring observed during the examination "is consistent with penetrating trauma."

19. Notwithstanding C.L.'s repeated denials that any sexual abuse had taken place, the nurse practitioner told Ms. L. that based on the findings of the examination, she believed that C.L. had been sexually abused.

20. After C.L. was examined by the nurse practitioner with the Child Protective Team, C.L. and her mother met with a counselor at the CPT office. The counselor told C.L. that if someone had touched her, she should tell her mother and the counselor. C.L. did not verbally respond, but became visibly upset. The counselor then left the room, afterwhich, Ms. L. reiterated that C.L. should tell if someone had touched her and made her feel uncomfortable.

21. After the counselor left the room and in response to her mother's question, C.L. stated that the only person who touched her was her music teacher. C.L.'s mother then asked, "Your music teacher?" C.L. then replied, "You know, the one I said was creepy." In describing how her music teacher touched

her, C.L. said only that he would hold her on his lap real tight. C.L. then began crying. About that time, the counselor returned to the room, and Ms. L. told her what C.L. had just revealed to her.

22. In making the comment, "You know, the one I said was creepy," referred to in paragraph 21, C.L. was referring to an earlier conversation she had with her mother about the music teacher. In or about November 2003, when C.L. came home from school, she told her mother that the music teacher was "creepy." Ms. L. then asked C.L. what did she mean. In response, C.L. told her mother, "He makes me sit on his lap."

23. At or near the time C.L. made the statements to her mother noted in paragraph 22, C.L.'s parents discussed what C.L. told her mother. At that time, the parents did not suspect sexual abuse. So after discussing the matter, C.L.'s parents decided they did not want to get an innocent person in trouble, but if it happened again, they would "address it."

24. After Ms. L. told the counselor what C.L. had said while the counselor was out of the room, the counselor asked Ms. L. what she knew about the music teacher. Ms. L. told the counselor about an incident that occurred at or near the beginning of school when she attended that school's open house. According to Ms. L., when she visited the music teacher's room

during the open house, he flirted with her. However, there is no indication of exactly what the music teacher did to lead Ms. L. to that conclusion.

25. It is unclear whether C.L. was in the room or had left the room when her mother told the counselor about the "flirting" incident.

26. After Ms. L. told the counselor that C.L. had said the music teacher held her on his lap, the counselor asked C.L. if that was all that he had done and did it make her feel uncomfortable. C.L. answered, "Yes," and said that the music teacher had just held her tight and would not let her get up.

27. After leaving the Child Protective Team office, Ms. L. went to a fast food restaurant before taking C.L. back to school. While at the drive-thru window, Ms. L. noticed that C.L. was clutching a stuffed animal and was crying. Ms. L. asked C.L. what was wrong. C.L. told her mother that she needed to tell her what had happened. After Ms. L. pulled over in the parking lot, C.L. told her mother, "It was him." Ms. L. asked C.L., "Who is him?" C.L. answered, "My music teacher." In response to her mother's asking what was her music teacher's name, C.L. said, "Mr. Fronczak."

28. Immediately after C.L. made the revelations described in paragraph 27, Ms. L. went home and called her husband.

Mr. and Mrs. L. then called the Pinellas County Sheriff's Office.

29. Subsequently, C.L. revealed additional details concerning the number of times and how Respondent touched her.

30. During the 2003-2004 school year when C.L. was a second grade student at Southern Oak, her class went to Respondent for music once a week. Each music period class lasted about 30 to 45 minutes.

31. Every other week, Respondent showed the students a curriculum-related video, which would be played on the television which was located at the front of the classroom. The students in C.L.'s class would always sit on the floor to watch the videos. Whenever Respondent showed a video to C.L.'s class, the lights in the classroom were turned off, and the vertical blinds at the windows were closed.

32. While the video was showing, Respondent sat in a chair in the back of the room, with the students seated in front of him, a few feet away. The students were facing the television and had their backs to him. The chair in which Respondent sat had no sides or arms.

33. C.L. did not always sit on the floor during the entire time the video was playing because Respondent would whisper to her, "Come over here." C.L. reasonably understood Respondent's statement to mean that he wanted her to come to where he was

seated. In response to the directive, C.L. usually would get up from the floor where she was sitting with the other students and go to Respondent. She would then be required to sit in his lap. If C.L. did not get up when Respondent whispered to her, he would pull her or pick her up and take her to his chair and put her on his lap.

34. Even though C.L. was unable to state the exact time that the incidents described in paragraph 33 occurred, her credible testimony was that the incidents occurred about four or five times during the 2003-2004 school year.

35. The first time C.L. was required to sit in Respondent's lap, he touched her inappropriately in her "private area," either under or over her clothes. This encounter lasted about five or ten minutes, and less time than the video played. While C.L. was sitting on Respondent's lap, she did not say anything, but she did try to get up. However, she could not get up because Respondent was holding her down.

36. In a second incident, Respondent touched C.L. in her private area. C.L. testified that she thought, in this instance, Respondent touched her under her clothes, put his hand in her underpants, and put his fingers inside her. When Respondent put his fingers inside her, C.L. did not scream, even though it hurt and felt like "needles went through" her.

37. During a third incident, Respondent touched C.L. in her private area, but over her clothes. On that particular day, C.L. was sitting on the floor near the back of the music room. Respondent whispered to her, "Come over here." C.L. just turned around, but did not go to Respondent. However, after C.L. did not come to him, Respondent again told C.L. to come to him. After the second directive from Respondent, C.L. got up and went to him. In this instance, C.L. was on Respondent's lap for five or ten minutes, during which he touched C.L. over her underwear.

38. During a fourth incident, Respondent touched C.L. inside her underwear and put his fingers inside her. He may have used two hands, but only one hand at a time. Respondent used one hand to hold her on his lap while his other hand was inside her underwear and/or inside her. He would then sometimes change or alternate hands. When Respondent put his fingers or finger inside C.L., it hurt, but, again, she did not scream. C.L., as she had during the past incidents, tried to get up from Respondent's lap, but she was unable to do so because Respondent was holding her down. When it was over, Respondent let C.L. up, and she went back to her seat on the floor.

39. The foregoing incidents did not occur every time C.L. was in music class. However, when each incident occurred, the lights in the classroom were out, the vertical blinds were closed, and Respondent was seated in his chair (which did not

have sides/arms), in the back of the classroom behind the students.

40. During these incidents, C.L. did not sit in Respondent's lap the entire class period or the entire time the video was playing.

41. Given that the incidents happened more than two years ago, when C.L. was only about seven years old, she could not specifically identify the time during the 2003-2004 school year that the incidents occcurred.

42. C.L. could not recall, in each of the incidents described above, whether Respondent touched her private area over or under her clothes. However, C.L. clearly recalled that in the two or three instances when Respondent touched her under her clothes, she was wearing a skirt.

43. Even though C.L. was unable to identify the precise dates and to describe the exact inappropriate touching that occurred in each instance, C.L.'s testimony that four or five such incidents happened during the 2003-2004 school year in Respondent's class is found to be credible.

44. C.L. recalls that at some point, there was blood in her panties. However, she does not recall whether there was bleeding after Respondent touched her in her private area.

45. Prior to the incidents described above, C.L.'s parents had told her about "good touch, bad touch." C.L. believed that

what Respondent was doing to her was inappropriate. However, until April 2004, she did not tell her parents or anyone else that Respondent had been touching her in her private area, even though she had been specifically asked if anyone had touched her in that area.

46. C.L. initially told the law enforcement officers who were investigating her allegations that she was not afraid of anyone. However, the reason C.L. did not initially tell anyone that Respondent touched her inappropriately was that she was afraid that she would get in trouble with "the teacher." Another reason C.L. did not tell anyone what happened was that she was afraid that if she told anyone, Respondent would come and hurt her whole family.

47. In April 2004, C.L. finally told her mother that Respondent had touched her because she was "tired of having to go to [medical] exams and missing out on class activities."

48. Despite C.L.'s denying several times that anyone had touched her in an inappropriate manner, those earlier denials are not a basis for discounting her testimony that the incidents described above occurred. In cases such as this, children frequently delay for a significant period of time that they have been the victims of sexual abuse.

49. Prior to C.L.'s disclosing that Respondent had touched her, no one suggested to her that Respondent had done anything

to her. C.L.'s reason for stating that Respondent touched her was that he had done so. In fact, C.L.'s credible testimony was that no one had ever touched her in her "privates" like Respondent did.

The Testimony of Sally Smith, M.D.

50. Sally Smith, M.D., is board-certified in pediatrics and has worked in the field of child abuse for 19 or 20 years. During that time, Dr. Smith has handled at least 1,000 sexual abuse cases. In or about 2002, Dr. Smith became the medical director for the Pinellas County Child Protective Team. As medical director, Dr. Smith conducts examinations of children for the Child Protective Team. In addition to conducting such examinations, Dr. Smith also supervises the two nurse practitioners with the Child Protective Team who also conduct such examinations, including the nurse practitioner who examined C.L. in April 2004.

51. According to the medical report, at the time C.L. was examined by the nurse practitioner at the CPT office, C.L. had not reported any abuse.

52. The nurse practitioner who examined C.L. documented seeing an abnormality of the hymen, the membrane that covers part of the opening of the vagina. According to the medial report, the back part of C.L.'s hymen, the part near the rectum, was abnormal in that there was an area of the hymen that was

about 25 percent missing, which indicated the abnormality was caused by a laceration. Also, there was also some scarring in that area, which indicated healing of the laceration.

53. The type of abnormality found in C.L. is one of the few types of abnormalities considered specific for penetrating trauma. Based on her review of the examination and the photographs related thereto, Dr. Smith could not say definitively what caused the laceration. However, based on her review of the report and the photographs of C.L.'s genital area, Dr. Smith's credible testimony was that the photographs and examination report indicate that C.L. had a significant episode, or perhaps one or more episodes of penetrating trauma to the hymen-vaginal area. It takes at least several weeks to develop scar tissue. Accordingly, the fact that the area was scarred at the time of the examination indicates that the injury occurred several weeks to a month prior to examination.

54. Respondent suggested that the injury to C.L.'s hymen may have been caused by an injury to the genital area, but presented no evidence to support this suggestion. Contrary to this proposition, C.L. has no history of previous penetrating trauma to her genital area due to an accidental injury.

55. The type of injury/abnormality of C.L.'s hymen documented during examination is not the type seen in a straddle injury. Because the hymen is located a half inch to an inch

above the surface and is protected by the outer labia in the genital area, straddle injuries do not result in hymenal injuries.

56. Respondent suggests that the injury to C.L.'s hymen may have been caused by masturbation, but presents no evidence to support this suggestion. Contrary to Respondent's assertion, the credible testimony of Dr. Smith is that the abnormality or injury to C.L.'s hymen that was seen at the time of C.L.'s examination in April 2004 is not the type of injury seen in children who masturbate. Moreover, the abnormality or injury observed in C.L. could not be caused by C.L.'s inserting her own finger into the vaginal opening. The reason is that the child's own finger is similar in size to that of the opening of her vagina, so her finger would not cause the lacerations or trauma. However, a grown man's finger could cause such lacerations or trauma.

57. The credible testimony of Dr. Smith is that the injury to C.L.'s hymen is evidence of sexual abuse. Moreover, the abnormality or injury to C.L.'s hymen was consistent with C.L.'s late reporting of how Respondent had inappropriately touch her.

58. The medical report prepared at or near the time C.L. was examined by the nurse practitioner at the Child Protective Team office noted that C.L. had had three episodes of vaginal

bleeding over the preceding four months, one of which lasted about ten days. This information was provided by C.L.'s mother.

59. In this case, the episodes of bleeding can not be linked to the times that C.L. experienced the penetrating trauma described above. However, because injuries such as the one that C.L. had do not necessarily result in bleeding, such a link is not dispositive in determining when or how the injuries occurred. The credible and undisputed testimony of Dr. Smith is that the hymen of a child C.L.'s age, prior to puberty, is a relatively thin membrane that does not have a lot of blood vessels, and, therefore, a laceration of the hymen may not bleed like a cut on the skin. However, a "fair percentage" of children that have an incident of penetrating trauma to the genital area may have some fluid/discharge associated with such trauma, but not necessarily bleeding.

60. In this case, there is no definitive medical explanation for the cause of C.L.'s bleeding.

61. C.L.'s vaginal bleeding occurred from December 2003 through February 2004, but did not occur after Respondent was removed from the school in late April 2004.

62. The trauma necessary to tear the hymen would be associated with some sensation for the child. However, often, in incidents such as those described in paragraphs 36 and 38,

the child may not react, cry out, or make any verbal response to the penetration and/or significant trauma.

63. According to the credible testimony of Dr. Smith, children frequently delay divulging, for a significant period of time, that they have been sexually abused.

Testimony of Wade Meyers, M.D.

64. Wade Meyers, M.D., is a child and adolescent psychiatrist and forensic psychiatrist. Dr. Meyers is currently a professor at the University of South Florida, where he is chief of the Division of Child Psychiatry in the Department of Psychiatry.

65. During this proceeding, Dr. Meyers testified regarding his opinion of the credibility of the students who made the allegations that are at issue in this proceeding. In preparation for giving his opinion, Dr. Meyers reviewed materials which included deposition transcripts, videotaped depositions, and a number of Pinellas County investigative reports.[1] Dr. Meyers did not specify which documents he reviewed for each particular student. However, Dr. Meyers did not review any videotaped depositions or videotaped interviews of C.L., but only her deposition transcript(s).

66. Based on Dr. Meyers' review of the materials described in paragraph 65, he opined that C.L.'s allegations regarding Respondent were not credible and that she had not been abused

sexually in any way by Respondent. Dr. Meyers based his conclusions and/or opinions on the four reasons set forth below.

67. First, Dr. Meyers testified that C.L.'s allegations cannot be validated as the medical evidence and the timing do not fit logic that would match digital penetration in a young girl. This assertion is based on the medical record which indicates that the bleeding started in December 2003 and went on for five or eight to ten days. Dr. Meyers noted when the bleeding was first observed, during the Thanksgiving holiday, when students were out of school. Also, when the bleeding was first observed, C.L. had not been in school for several days and had not been in Respondent's class for about two weeks. Dr. Meyers apparently believed that the bleeding was necessarily related to C.L.'s allegations that Respondent had digitally penetrated her. Based on this belief, Dr. Meyers concluded that because C.L. had not been in Respondent's music class for about two weeks prior to Ms. L.'s discovering blood in C.L.'s underwear, Respondent could not have penetrated C.L.'s hymen.

68. Dr. Meyers' conclusion, that the medical evidence and timing do not logically coincide with the allegation that Respondent digitally penetrated C.L., is not persuasive. This conclusion or assertion is contrary to the credible and persuasive testimony of Dr. Smith that there is not necessarily bleeding associated with digital penetration of a child C.L.'s

age. Therefore, the truth regarding C.L.'s allegation that Respondent digitally penetrated C.L. need not be tied or related to any specific episode of bleeding.

69. Second, Dr. Meyers asserted that C.L.'s initial denial and subsequent denials that any sexual abuse had occurred are a basis for not believing her later statements that Respondent engaged in the alleged conduct.[2] According to Dr. Meyers, a victim of sexual abuse usually reveals such abuse in the initial interview.

70. Dr. Meyers' conclusion, in paragraph 69, based on his assertion that victims of sexual abuse usually reveal such abuse in their initial interview, is not persuasive. Dr. Smith's credible testimony, that victims of sexual abuse or acts alleged by C.L. frequently do not disclose this information until some time after the incidents have occurred, is persuasive.

71. Third, Dr. Meyers testified that when evaluating children for sexual abuse, it is important to not do multiple interviews. According to Dr. Meyers, when children who have initially denied that sexual abuse has occurred are interviewed multiple times, the children may feel pressured to change their answer, and they may begin to doubt if they actually forgot what happened. Therefore, their initial statements, not their subsequent statements, are more credible. Where, as in this case, C.L. was interviewed and/or questioned multiple times,

Dr. Meyers testified that her subsequent statements, in which C.L. alleged inappropriate touching by Respondent, are not credible.

72. Dr. Meyers' conclusion that C.L.'s allegations regarding Respondent are not credible because she felt pressured to make the allegations after she was questioned or interviewed multiple times is not persuasive. Admittedly, Dr. Meyers never met or interviewed C.L. or viewed any videotaped depositions or videotaped interviews of C.L. Therefore, at most, his conclusion and opinion are based solely on a review of written documents (i.e. the deposition transcript and/or investigative reports). Moreover, those conclusions and opinions are contrary to C.L.'s credible, persuasive, and clear testimony presented at this proceeding.

73. Fourth, Dr. Meyers asserts that C.L.'s allegations lack credibility because of the leading and suggestive questioning techniques used during C.L.'s deposition and/or interviews.[3] Dr. Meyers testified that the techniques used were not only improper, but likely resulted in C.L.'s having a "false memory" about the alleged incidents. According to Dr. Meyers, a false memory is one in which the source of the memory (i.e. the purported suggestive and/or leading questions) is false even though to the child the memory is real.

74. Dr. Meyers' conclusion that C.L.'s allegations regarding Respondent are not credible, but instead are the result of a "false memory" are not persuasive. Furthermore, this conclusion and opinion are contrary to the credible, persuasive, and clear testimony of C.L. presented at this proceeding.

75. For the reasons stated above, the conclusions and/or opinions of Dr. Meyers, as they relate to C.L., are not persuasive.

Situation Involving St.H. and Sa.H.

76. When St.H. and Sa.H. were in first grade, their mother, Ms. H. asked them how was their day at school. The girls never talked much about their teachers. However, in response to their mother's question, the girls reported that Respondent stroked their hair. Ms. H. wondered about this behavior and asked a teacher whether a teacher's stroking students' hair was normal behavior. After the teacher told Ms. H. that that was just the way Respondent was, Ms. H. thought that Respondent's behavior (stroking the girls' hair) was not necessarily inappropriate. Based on her conversation with the teacher, Ms. H. never discussed the matter with Respondent.

77. When St.H. was in first grade, Respondent was her music teacher. During music class, Respondent would call St.H. to come up to him, and he would "take [her] waist" and sit her

on his lap. While St.H. was sitting on Respondent's lap, he would stroke her hair and rub her neck and stomach.

78. When St.H. was in Respondent's music class, the vertical blinds at the windows were always closed.

79. St.H. recalled that she sat on Respondent's lap every music period.

80. St.H. sat on Respondent's lap when the students in the music class were playing instruments, but did not stay on his lap the entire music period. When Respondent was showing the students how to play the various instruments, he would make St.H. get off his lap.

81. Respondent also had St.H. to sit in his lap when he showed videos to the class. After Respondent turned the television on, he would go back to his chair, he'd then pat his leg. St.H. would then go to Respondent and sit in his lap. The reason St.H. went to Respondent and sat on his lap is because she knew what that sign, patting his leg, meant "because he does [did] that a lot and that means [meant] for me to go to him."

82. Even though sitting on Respondent's lap made St.H. feel uncomfortable, she never told Respondent how she felt. However, St.H. did ask him why he had her sit on his lap. Respondent then told St.H. that her older sister (who at this time was about 15 years old) had sat in his lap, presumably when she was in his class.

83. St.H. wrote about Respondent's actions in her journal, but she later disposed of the journal because the journal entries reminded her of the bad memories.

84. St.H. would not want Respondent as a teacher again because she would not want to go through the experience she had with Respondent again.

85. When Sa.H. was in first grade, Respondent showed videos during music class. Respondent turned out the lights when he showed the videos.

86. When the video was showing and the lights were out, sometimes Sa.H. would have to sit on Respondent's lap. Sa.H. did not sit in his lap the entire class period, but only sat there about five minutes. When Sa.H. was sitting on Respondent's lap, he would rub her stomach and back and tap her legs.

87. At this proceeding, more than two years after the events related to Sa.H. occurred, she could not recall when she first sat on his lap or how she knew to go to Respondent and sit on his lap. However, Sa.H. did not want to sit on Respondent's lap and felt nervous when she was on his lap.

88. Sa.H. never told Respondent that she did not want to sit on his lap. Moreover, Sa.H. never told anyone that she was sitting on Respondent's lap during the time she was in first grade.

89. Sa.H. would not want Respondent as a teacher again because of what he did to her. According to Sa.H., "It would be very scary again."

90. The testimony of St.H. and Sa.H. is found to be credible, notwithstanding the conclusion of Dr. Meyers to the contrary.

Respondent's Denies Alleged Inappropriate Conduct

91. At this proceeding, Respondent testified that he never touched any student inappropriately. According to Respondent, this is evidenced by the fact that, in the criminal trial that was based on the allegations of C.L., the jury acquitted him.

92. At this proceeding, Respondent testified that he never touched C.L. inappropriately and that she never sat in his lap.

93. During his testimony at his criminal trial, Respondent testified that he did not recall if C.L. sat on his lap during the movies/videos. However, Respondent recalled that C.L. came to him when she was feeling sad, but she was not on his lap. Rather, Respondent recalled that C.L. stood next to him and sat on his knee for a short period of time, and he asked her what was wrong. Based on this testimony, Respondent appears to try to make a distinction between C.L. sitting on his lap and sitting on his knee.

94. Contrary to his testimony at trial, at this proceeding, Respondent testified that when C.L. was sad or

something was wrong, she came up to him and leaned on his knee. According to Respondent, he taught about 700 students a week, and, when they are sad or something is wrong, they come up to him as C.L. did.

95. At this proceeding, Respondent testified that he never touched either St.H. or her sister, Sa.H., or had them sit in his lap.

96. Notwithstanding Respondent's testimony at this proceeding that he never allowed any student to sit in his lap, during his deposition, he testified that he had kids in his lap all the time. In explaining this seeming discrepancy in his sworn testimony, Respondent explained that when he said students were in his lap all the time, he meant that they were "standing next to me" or "leaning on my knee when they come up to get instruments." Respondent testified that this would happen because this (i.e. getting the musical instruments) was a fun activity, and the children would get excited. However, according to Respondent, there was nothing sexual about the children standing next to him or leaning on his knee. They would simply get their instruments and return to their seats.

97. Respondent gave several explanations that he apparently believed established that it would not be reasonable for him to engage in the alleged misconduct in light of the number of people who were regularly in and near his classroom,

often with no advance notice. First, many visitors, including parents of prospective Southern Oak students, came to Southern Oak to observe the school. During these visits, the visitors sometimes went into the music classroom while class was in session. Second, Robert Ammon, principal of Southern Oak, circulated throughout the school almost every morning. Even though Mr. Ammon did not necessarily go into the music classroom every day, he would walk in or near the general vicinity of Respondent's classroom. Third, because there was a refrigerator and microwave in the office in the music room, several teachers were routinely in and out of Respondent's classroom each day to get and/or warm their food.

98. Respondent's explanations are not a sufficient basis to support his assertion that it was not reasonable for him to engage in the alleged misconduct. In fact, the teachers who were in and out of Respondent's classroom, or more specifically, the office in the music classroom, on a regular basis, were there for a specific purpose and only for a few minutes.

99. Respondent's testimony at this proceeding, in which he denied inappropriately touching C.L., St.H., and Sa.H., is not credible.

<u>Prior Complaints or Disciplinary Actions Against Respondent</u>

100. Prior to the matters at issue in this proceeding, there have been three complaints filed against Respondent during

his tenure with the Pinellas County School District. Two of the complaints were determined to be unfounded, and one resulted in a letter of caution being issued to Respondent.

101. The incident which resulted in Respondent's receiving a letter of caution, involved an act of dishonesty. Specifically, Respondent made a telephone call to someone, and, during that call, he misrepresented himself as someone calling from the superintendent's office on behalf of a School Board member.

102. In the 2001-2002 school year, a complaint was made against Respondent. In January 2002, the assistant principal at Southern Oak notified the principal, Mr. Ammon, of allegations that Respondent had inappropriately touched students. The matter was reported to the Pinellas County School District's Office of Professional Standards, which then reported the matter to the Pinellas County Sheriff's Office. After an on-site investigation was conducted, the allegations were determined to be unfounded.

103. The Office of Professional Standards received the investigation determination of "unfounded" from the Sheriff's Office.

104. The Office of Professional Standards defines the term "unfounded" to mean that the conduct alleged never happened. Accordingly, the allegations in the complaint discussed in

paragraph 102 were deemed not to have happened. Therefore, no disciplinary action was imposed against Respondent.

105. After the January 2002 complaint was investigated and determined to be unfounded, Mr. Ammon met briefly and "informally" with Respondent. Although no disciplinary action was required or appropriate in this situation, Mr. Ammon discussed with Respondent the need for him to not put himself in a situation where such charges (inappropriate touching of students) might come up. During this conversation, after Mr. Ammon perceived that Respondent did not comprehend the seriousness of the issue, Mr. Ammon directed Respondent not to touch students for any reason.

106. Mr. Ammon regularly conducted faculty meetings where he cautioned teachers to exercise common sense in their physical contact with students and reminded them of appropriate boundaries in this context.

107. During the 2002-2003 school year, a teacher reported to Mr. Ammon that some students had come to her about Respondent inappropriately touching them. The matter was then reported to the Pinellas School District's Office of Professional Standards and to the Pinellas County Sheriff's Office.

108. As directed by the Office of Professional Standards, Mr. Ammon interviewed the students. As with the previous complaint, following the interviews and the investigation, the

allegations were determined to be unfounded, and possibly retaliatory. As a result thereof, the Office of Professional Standards deemed that the alleged conduct never occurred, and no disciplinary action was imposed on Respondent.

Superintendent's Recommendation of Dismissal

109. On or about April 28, 2004, Respondent was arrested and subsequently charged with capital sexual battery and lewd and lascivious behavior on a child.

110. By letter dated May 30, 2004, Dr. J. Hinesley, then superintendent of the Pinellas County School District, recommended that the School Board dismiss Respondent as a teacher. According to the description of the agenda item related to Respondent's dismissal, the rationale for the superintendent's recommending dismissal was that Respondent's alleged actions were a violation of Pinellas County School Board Policy 8.25(1)(a), (c), (n), (u), and (v).[4]

111. Pinellas County School Board Policy 8.25 has been duly-adopted by the School Board. That policy enumerates offenses for which disciplinary action may be imposed and sets out the penalty or penalty range for each offense.

112. School Board Policy 8.25(1)(a) makes it an offense for school board employees to engage in inappropriate sexual activity, including sexual battery and other activities. The penalty for employees who engage in such conduct is dismissal.

113. School Board Policy 8.25(1)(c) makes committing a criminal act (felony) an offense for which the School Board employees may be disciplined. The penalty range for this offense is reprimand to dismissal.

114. School Board Policy 8.25(1)(n) lists, as an offense, making inappropriate or disparaging remarks to or about students or exposing a student to unnecessary embarrassment or disparagement. The penalty range for this offense is caution to dismissal.

115. School Board Policy 8.25(1)(u) lists, as an offense, insubordination. The penalty range for committing this offense is caution to dismissal.

116. School Board Policy 8.25(1)(v) lists, as an offense, misconduct in office. The penalty range for this offense is caution to dismissal.

117. Prior to this proceeding, and after the superintendent recommended Respondent's dismissal, Respondent was tried on the criminal charges and was found not guilty.

118. Notwithstanding Respondent's being acquitted of the criminal charges, in the instant administrative proceeding, it is found that Respondent inappropriately touched C.L., St.H., and Sa.H. and also failed to observe the appropriate boundaries in his physical contact with those students.

CONCLUSIONS OF LAW

119. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this case. See §§ 120.569, 120.57, and 1012.33(6), Fla. Stat. (2005).

120. The superintendent of the School Board has the authority to make recommendations for dismissal regarding school employees pursuant to Subsection 1012.27(5), Florida Statutes (2004).[5]

121. The School Board has the authority to dismiss school board employees pursuant to Subsections 1001.42(5) and 1012.22(1)(f), Florida Statutes. Moreover, the School Board is authorized to dismiss instructional staff with professional service contracts at any time if such dismissal is based on "just cause." See § 1012.33(1), Fla. Stat.

122. The School Board, as Petitioner, has the burden of proof in this employee dismissal hearing and must meet that burden by a preponderance of the evidence. Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3rd DCA 1990); and Allen v. School Board of Dade County, 571 So. 2d 568 (Fla. 3rd DCA 1990).

123. In this case, the School Board alleges that Respondent violated various provisions of School Board

Policy 8.25, a duly-promulgated policy, and that the alleged violations constitute just cause for Respondent's dismissal under Subsection 1012.33(1), Florida Statutes,[5] and Florida Administrative Code Rule 6B-4.009.

124. School Board Policy 8.25 establishes offenses that constitute "just cause" for dismissal of a teacher and the range of penalties that may be imposed for committing a particular offense.

125. Pursuant to Subsection 1012.33(1), Florida Statutes, or "just cause" is defined as follows:

> Just cause includes, but is not limited to, the following instances as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude.

126. Section 1012.33, Florida Statutes, does not purport to be an all-inclusive list of conduct that constitutes "just cause" for dismissal. By specifically providing that "just cause includes, but is not limited to . . . ," the Florida Legislature gave school boards discretion to determine what actions constitute just cause for suspension or dismissal. Carl B. Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2nd DCA 1994). Pursuant to this authority, a school board may define by policy conduct that constitutes "just cause" for

dismissal of an employee who has a professional service contract.

127. The School Board alleges that Respondent violated the School Board Policy 8.25(1)(a), (c), (n), (u),[7] and (v), which provides in pertinent part the following:

> (a) Inappropriate sexual conduct including, but not limited to lewd and lascivious behavior, indecent exposure, solicitation of prostitution, sexual battery, possession or sale of pornography involving minors, sexual relations with a student
>
> * * *
>
> (c) Committing or conviction of a criminal act - felony
>
> * * *
>
> (n) Inappropriate or disparaging remarks to or about students or exposing a student to unnecessary embarrassment or disparagement
>
> * * *
>
> (u) Insubordination, which is defined as a continuing or intentional failure to obey a direct order, reasonable in nature, and given by and with proper authority
>
> * * *
>
> (v) Misconduct in office

128. The offense, "misconduct in office," in School Board Policy 8.25(1)(v) is also specifically listed in Subsection 1012.33(1), Florida Statutes, as an offense which constitutes "just cause" for a teacher's dismissal.

129. Florida Administrative Code Rule 6B-4.009, which defines the charges listed in Section 1012.33, Florida Statutes, and upon which dismissal action against teachers may be pursued, provides in pertinent part the following:

> The basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36 [currently 1012.33], Florida Statutes. The basis for each of such charges is hereby defined:
>
> * * *
>
> (3) Misconduct in office is defined by state board rules 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.

130. The School Board established by a preponderance of the evidence that Respondent engaged in inappropriate sexual conduct with C.L. by digitally penetrating C.L.’s vagina and touching her private area.

131. The School Board also established by a preponderance of the evidence that Respondent engaged in lewd and lascivious behavior with C.L., St.H., and Sa.H. by having them sit on his lap and holding them there. The preponderance of evidence also established that Respondent engaged in lewd and lascivious behavior with St.H. and Sa.H. by stroking their hair and rubbing

their backs, necks, and/or stomachs without any educational purpose.

132. Respondent's conduct, as noted in paragraphs 130 and 131, constitutes an offense included in School Board Policy 8.25(1)(a) and is a basis for taking disciplinary action.

133. The School Board established by a preponderance of the evidence that Respondent is guilty of "committing a criminal act" that is deemed a felony (i.e. digitally penetrating C.L.'s vagina). By committing this offense, Respondent is subject to the disciplinary penalty provided for in School Board Policy 8.25(1)(c).

134. The School Board established by a preponderance of the evidence that Respondent is guilty of "exposing a student to unnecessary embarrassment or disparagement," the offense noted in School Board Policy 8.25(1)(n). By engaging in the conduct with C.L., St.H., and Sa.H., as described above, Respondent exposed the students to unnecessary embarrassment.

135. The School Board established by a preponderance of the evidence that Respondent intentionally refused to obey Mr. Ammon’s clear and reasonable directive, given on January 22, 2002, to not have any physical contact with students. As evidenced by Respondent's subsequent conduct and inappropriate physical contact with C.L., St.H., and Sa.H., Respondent is

guilty of insubordination, the offense listed in School Board Policy 8.25(1)(u).

136. The School Board established by a preponderance of the evidence that Respondent committed the offense in School Board Policy 8.25(1)(v), "misconduct or misconduct in office," by engaging in the inappropriate touching and physical contact with C.L., St.H., and Sa.H.

137. By engaging in conduct that constitutes "misconduct or misconduct in office," School Board Policy 8.25(1)(v), Respondent also violated the following provisions of Florida Administrative Code Rule 6B-1.006, which provides in relevant part the following:

> (1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.
>
> * * *
>
> (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.
>
> * * *

> (h) Shall not exploit a relationship with a student for personal gain or advantage.
>
> *   *   *
>
> (5) Obligation to the profession of education requires that the individual:
>
> *   *   *
>
> (d) Shall not engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination.

138. The penalty for committing the offense in School Board Policy 8.25(1)(a) is dismissal. The range of penalties for committing a criminal act, an offense listed in School Board Policy 8.25(1)(c), is from suspension to dismissal. The range of penalties for the offenses listed in School Board Policy 8.25(1)(n), (u), and (v) is from caution to dismissal.

139. The School Board has established by a preponderance of the evidence that Respondent committed the offenses in School Board Policy 8.25(1)(a), (c), (n), (u), and (v).

140. The School Board established by a preponderance of the evidence that Respondent violated Florida Administrative Code Rule 6B-1.006(3)(a), (e), (h), and (5)(d).

141. The offenses which Respondent committed constitute "just cause" for Respondent's dismissal as a teacher in the Pinellas County School District.

142. Here, the School Board seeks the most severe penalty, dismissal from employment. In this case, dismissal is not only within the prescribed penalty range for those offenses, but is required based on Respondent's committing offenses included in School Board Policy 8.25(1)(a).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Pinellas County School Board enter a final order that dismisses Respondent from his position as a teacher with the Pinellas County School District.

DONE AND ENTERED this 13th day of September, 2006, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
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 13th day of September, 2006.

ENDNOTES

1/ No testimony or evidence was presented to establish the dates and the purpose of the these depositions (i.e. whether they were given in preparation for this proceeding or for Respondent's criminal trial).

2/ Dr. Meyers testified that C.L. made such denial nine times (three times to her mother, once to her father, and five times to health care professionals who examined and/or looked at her).

3/ The deposition transcript to which Dr. Meyers referred was not offered into evidence. Therefore, no determination could be made as to whether the questions were, in fact, leading or suggestive.

4/ The original charging document did not allege a violation of School Board Policy 8.25(1)(u), which relates to insubordination. However, the Pre-Hearing Stipulation executed by both parties lists that provision as a basis for Respondent's dismissal.

5/ All references to Florida Statutes are to Florida Statutes (2004), unless otherwise indicated.

6/ The charging document referred to Section 231.36, Florida Statutes. However, the Pre-Hearing Stipulation, executed by both parties, correctly notes that the relevant statutory provision is now Section 1012.33, Florida Statutes. Section 231.36, Florida Statutes, was repealed, effective January 7, 2003, by Section 1058, Chapter 2002-387, Laws of Florida. The relevant language in Section 231.36, Florida Statutes (2001), is now contained in Section 1012.33, Florida Statutes, which was enacted by Section 707, Chapter 2002-387, Laws of Florida, and became effective January 7, 2003.

7/ See note under Endnote 4.

COPIES FURNISHED:

David A. Koperski, Esquire
Laurie Dart, Esquire
Pinellas County School Board
Post Office Box 2942
Largo, Florida 33779-2942

Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 110
Clearwater, Florida 33761

Daniel J. Woodring, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Honorable John Winn
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Dr. Clayton M. Wilcox, Superintendent
Pinellas County School Board
Post Office Box 2942
Largo, Florida 33779-2942

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.