

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HERNANDO COUNTY SCHOOL BOARD,     )  
  )  
      Petitioner,                        )  
  )  
vs.                                        )     Case Nos. 07-5362  
  )                        07-5363  
CHRISTOPHER O'BRIEN AND             )  
ANGELO DIPAULO,                        )  
  )  
      Respondents.                     )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on April 2, 2008, in Brooksville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: J. Paul Carland, II, Esquire  
Hernando County School Board  
919 North Broad Street  
Brooksville, Florida 34601

For Respondent: Christopher O'Brien  
Mary F. Aspros, Esquire  
Meyer and Brooks, P.A.  
2544 Blairstone Pines Drive  
Tallahassee, Florida 32301

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

STATEMENT OF THE ISSUES

(1) Whether Petitioner School Board had just cause to reprimand Respondent Christopher O'Brien and suspend him for five days without pay.

(2) Whether Petitioner School Board had just cause to reprimand Respondent Angelo DiPaolo and suspend him for three days without pay.

PRELIMINARY STATEMENT

On or about November 7, 2007, Respondent Christopher O'Brien was served with Petitioner School Board's disciplinary letter reprimanding him and issuing a five-day suspension without pay. Mr. O'Brien filed a timely request for hearing, and on November 21, 2007, the cause was referred to the Division of Administrative Hearings for a contract hearing, where it was assigned DOAH Case No. 07-5362.

On or about November 7, 2007, Respondent Angelo DiPaolo was served with Petitioner School Board's disciplinary letter reprimanding him, and issuing a three-day suspension without pay for his actions arising out of the same incident involving Respondent O'Brien. Mr. DiPaolo filed a timely request for hearing with Petitioner, which request was referred to the Division and assigned DOAH Case No. 07-5363.

The parties did not want to schedule final hearing until other peripheral matters were resolved, including discovery of a video tape from a third party. The record reflects all pleadings, motions, and orders herein, notable among which is

that both Respondents filed unopposed Motions to Consolidate. On January 24, 2008, an Order was issued, consolidating Respondent O'Brien's DOAH Case No 07-5362 with Respondent DiPaolo's DOAH Case No. 07-5363. A Notice of Hearing was issued on February 1, 2008, setting the consolidated cases for final hearing on April 2, 2008.

At hearing, Petitioner presented the oral testimony of Linda Smith, Director of Transportation; Rucell Nesmith, Operator Trainer/Safety Coordinator for Transportation; and Steve Daniels, ESE Driver Coordinator Specialist. Petitioner had admitted in evidence Petitioner's Exhibits 1-5, 7-22, 24-26, and 28-35.

Respondent O'Brien had two exhibits admitted in evidence and testified on his own behalf. Although not necessarily called as witnesses by each other, each Respondent testified on his own behalf during the consolidated hearing, and each one's testimony has been considered as to both Respondents. Respondent O'Brien's exhibits also have been considered as to both Respondents. The parties' Pre-hearing Stipulation was admitted as Joint Exhibit A.

A Transcript was filed on April 25, 2008. Petitioner and Respondent O'Brien timely filed their respective Proposed Recommended Orders directed to DOAH Case No. 07-5362, on May 15, 2008. Petitioner timely filed its Proposed Recommended Order in DOAH Case No. 07-5363; Respondent DiPaolo has filed no proposal. All proposals have been considered in completing this single Recommended Order.

#### FINDINGS OF FACT

1. At all times material, Christopher O'Brien was employed by Petitioner Hernando County School Board as a school bus driver.

2. Mr. O'Brien was first hired by Petitioner as a school bus driver in 2001. Prior to the events of this case, he had never been disciplined by his employer, and he had received a number of commendations.

3. At all times material, Angelo DiPaolo was employed by Petitioner as a school bus attendant.

4. Mr. DiPaolo was first employed and trained by Petitioner as a school bus driver for about one year, but he had been employed by Petitioner as a school bus attendant for the last six years preceding the incident in this case.

5. Respondents are members of the Hernando United School Workers Union (HUSW). For the 2007-2008, school year, both men were assigned by the School Board's Transportation Department to Bus 473, Route 22. During that school year, the bus carried between 50 and 60 children, ages kindergarten through eighth grade, to and from J.D. Floyd Elementary School. Student A.R. was one of these students.

6. On October 5, 2007, A.R. was a three-year-old, female, pre-kindergarten, Exceptional Student Education (ESE) student. She was a special needs child, whose 2007-2008, Individualized

Education Plan (IEP) called for her to have adult supervision while riding the bus.

7. The School Board had implemented A.R.'s IEP for the 2007-2008, school year by placing Mr. DiPaolo on Mr. O'Brien's bus. Steve Daniels, Petitioner's ESE Driver Coordinator Specialist, provided Mr. DiPaolo with written confirmation of his assignment, which included information on A.R.'s grade level, bus stop, and need for a special seat restraint. Mr. DiPaolo first met A.R. at the beginning of the 2007-2008, school year. Mr. DiPaolo's assigned first and primary responsibility was the safety of A.R., which included buckling her into her child safety seat, but his second and subordinate responsibility was to maintain order on the bus and manage the safety of the other 50-60 children.

8. Mr. O'Brien had met A.R. during the second semester of the 2006-2007, school year, when she was initially placed on his school bus route. During that school year, A.R. had ridden the bus driven by Mr. O'Brien without having a school bus attendant specifically devoted to her safety and exceptionalities. During that school year, Mr. O'Brien had been instrumental in getting a particular type of safety seat for A.R. to ride in, due to her small size. This type of seat is called "a C. E. White" or "CEW" child's safety seat, and has an integrated five-point harness.

9. During the 2006-2007, school year, Mr. O'Brien's bus had no bus attendant. Therefore, during that period of time, he had ultimate responsibility for all the children on his bus, including A.R.

10. During the 2006-2007, school year, A.R. was sometimes buckled into her bus safety seat by older siblings who rode the same bus, but Mr. O'Brien had a good rapport with A.R. and often also helped buckle her into her seat. To do so, he had to leave the bus driver's compartment of the bus.

11. During the 2007-2008, school year, A.R. and one sister, R.R., who was then approximately nine years old, continued to ride Mr. O'Brien's bus.

12. Mr. O'Brien was advised at the start of the 2007-2008, school year that A.R. would be riding with the adult supervision of Mr. DiPaolo. Mr. O'Brien was not made privy to the reasons why the decision had been made to require a bus attendant specifically for A.R., but he understood he was supposed to comply with this requirement, regardless of the reason. There also was testimony that any three-year-old attending kindergarten with a special bus attendant would be an ESE student.

13. In assessing the relative credibility and weighing the testimony of all the witnesses, as well as hearing the comments made by R.R. on the videotape of the October 5, 2007, incident,

it is found that A.R. was not a usually compliant and accepting bus passenger, but was frequently what any parent would recognize as difficult or oppositional. (See Finding of Fact 23.)

14. Indeed, during the 2007-2008, school year prior to October 5, 2007, Mr. DiPaolo had twice sought direction from Mr. Daniels, who had told him to do the best he could with A.R., but if Mr. DiPaolo's "best" did not work out, something else might have to be done about A.R.

15. A.R.'s father usually brought her to the bus stop. On the morning of October 5, 2007, a neighbor brought the two siblings to the bus stop. A.R. was already upset when boarding began.

16. On October 5, 2007, A.R. did not want to get on the bus. Mr. DiPaolo had to go down to the first step of the bus to get A.R. from the neighbor who was supervising the sisters at the bus stop. Once A.R. made it to the top step of the bus entrance, she still did not want to move. Mr. DiPaolo had to lift her up and place her in her C.E. White seat, which was strapped-into the window-side of the first row seat, immediately inside the door on the side of the bus opposite the driver's side. Once there, A.R. deliberately slumped off the car seat onto the floor of the bus. When lifted up again, A.R. repeated

the behavior. This "battle of wills" between the three-year-old and the bus attendant continued for a little while.

17. Fairly quickly, however, Mr. DiPaolo retired from the field of battle to speak to some students in the back of the bus. At this point, A.R. was either sliding herself onto the floor or was on the floor between the first row of seats and the stairwell barricade.

18. Despite some testimony to the effect that the older students in the back of the bus were rowdy and needed to be settled down, the video tape does not corroborate that "take" on the chain of events. While it might have been good strategy for Mr. DiPaolo to let A.R. cool off a little before again trying to buckle her into her seat, there does not appear to have been any pressing reason for Mr. DiPaolo to absent himself from her vicinity to address issues in the back of the bus. Moreover, A.R. was his first and prime responsibility, and he abandoned that responsibility by saying to A.R.'s sister, R.R., who was still standing and not in her own seat, that she should try to get A.R. buckled in, and he did not alert Mr. O'Brien that A.R. was not yet buckled-in.

19. Mr. DiPaolo's superior, Mr. Daniels, would have sanctioned Mr. DiPaolo's enlisting the aid of the older sibling if Mr. DiPaolo also had not simply abandoned the situation and walked to the back of the bus.



20. Mr. DiPaolo also could have, and did not, attempt to enlist the aid of the adult neighbor who had delivered A.R. to the bus stop, or he could have returned A.R. back to that adult neighbor and suggested the neighbor take A.R. to school separately, both of which were options his superiors testified they would have sanctioned. He could also have requested that Mr. O'Brien radio the dispatcher for help. He chose none of these options.

21. As Mr. DiPaolo gave instructions to A.R.'s sister and walked to the back of the bus, Mr. O'Brien, not realizing that A.R. was not secured into her seat, pulled the bus away from the stop.

22. Although Mr. O'Brien testified to several reasons that he believed A.R. was secured in her seat before he pulled the bus away from its stop, Mr. DiPaolo clearly had not orally advised him that she was buckled-in, and Mr. O'Brien did not, in fact, make sure that A.R. was secure before he pulled the bus into four-lane traffic. Moreover, the sister, R.R., was up and down while all this was going on. She was not always in her seat as the bus was moving, either.

23. R.R. was not able to secure A.R. in her seat, so she approached the driver's compartment and stated to Mr. O'Brien that they were going to have to do things "the hard way."

R.R.'s choice of words suggests that R.R. and Mr. O'Brien had previously had to buckle A.R. into her car seat by sheer force.

24. Approximately 25 seconds after he started the bus, during which time the bus entered the flow of four lanes of traffic and proceeded through an intersection, Mr. O'Brien pulled the bus over to the side of the road and stopped. During the whole of this period, A.R. was not in her seat or buckled-in.

25. When Mr. O'Brien pulled over, he put on the emergency brake and put the transmission in neutral. He intentionally left the bus engine running, because the doors on that type of bus are controlled by air pressure. Once the engine is turned off, the doors will open with just the touch of a hand from either inside or outside the door. For safety reasons, he wanted the door to remain secure.

26. Under the circumstances, pulling over the bus was probably a wise move, but Mr. O'Brien went further. He could have summoned Mr. DiPaolo to come back and do his job as A.R.'s bus attendant, and he could have called dispatch to alert the administration to a problem requiring their help, but instead, Mr. O'Brien left the driver's compartment to check on A.R.

27. When Mr. O'Brien reached her, A.R. was not in her seat. He lifted her up from the floor of the bus and attempted to buckle her into her seat. At first, Mr. O'Brien was not

successful getting A.R. into her seat and asked her if she knew she was about to get "a spanking." Mr. O'Brien admitted to threatening to spank A.R. to "snap her out of it," and to emphasize the importance of complying with his demands, even though he knew that "corporal punishment" was against Petitioner's policies. His voice was firm in making the statement and more matter-of-fact than threatening. However, his threat was loud enough to be heard over the general commotion on the bus, the idling engine, and the sound of traffic. R.R. and at least a few nearby children must have heard the threat.

28. When A.R. continued to physically resist Mr. O'Brien's efforts to get her into her seat, he administered a single, swift slap to her right buttocks/thigh area. A.R. did not cry out specifically at that point, although later she began to cry. After spanking A.R., Mr. O'Brien was able, unassisted, to wrestle her into her seat and buckle her in.

29. At some point in Mr. O'Brien's struggle, Mr. DiPaolo returned and stood in the aisle, level with the back of A.R.'s seat, observing Mr. O'Brien interacting with A.R. and A.R. crying.

30. The "driver's compartment" on Mr. O'Brien's bus does not show up well in the video and there was no testimony concerning how it is configured. However, it does not appear to

be separated from the students' seats by a door or partition. The diagrams in the Operations Handbook show clear access to the driver's seat and controls from the student seats on the driver's side immediately behind the driver's seat, if the driver is not in his seat, regardless of whether anyone is blocking the aisle.

31. During the entire period of time Mr. O'Brien was dealing with A.R., he had his back turned towards the driver's seat and controls, which he had left unattended. During this entire period of time, the bus engine continued running and the doors remained closed. However, Mr. O'Brien's bus has just a knob for an emergency brake and anyone could have hit the knob so that the bus would begin rolling forward.

32. After securing A.R. and being sure R.R. also was safely seated, Mr. O'Brien returned to the driver's compartment and drove the bus to school.

33. A.R.'s screaming, crying, and fussing seems to have escalated after Mr. O'Brien resumed the driver's seat, when Mr. DiPaolo said something to A.R. about his not being willing to sit with her. However, Mr. DiPaolo eventually sat next to A.R. and interacted with A.R. to keep her amused, and apparently happy, until the bus stopped again and the passengers debarked at J.D. Floyd Elementary School.

34. Mr. O'Brien described the incident to A.R.'s classroom teacher when he delivered A.R. into her care at the school on October 5, 2007. He did not report it to Petitioner's Transportation Department, because it was, in his mind, a minor bit of misbehavior by a student. Mr. DiPaolo also made no report. The undersigned is not persuaded that either Mr. O'Brien or Mr. DiPaolo tried to keep the incident secret.

35. One of Petitioner's own training manuals provides:

Minor incidents of misbehavior such as getting out of the seat, standing, or speaking loudly are usually better handled on the bus. If every incident of misbehavior is reported to the principal, the operator will lose credibility.

36. However, on the following Monday morning, A.R.'s mother boarded Mr. O'Brien's bus and made a scene, accusing Mr. O'Brien of spanking A.R. on her bottom. The mother then proceeded to Petitioner's administrative offices, where she lodged a complaint, and finally went on to the Sheriff's Office to do the same. Ultimately, because they are required to do so when there is an accusation of corporal punishment, Petitioner's administration notified the Department of Children and Family Services of the mother's allegations.

37. After receiving the complaint, Linda Smith, Petitioner's Director of Transportation, requested a copy of the October 5, 2007, surveillance video from the front of Bus 473.

That surveillance film was admitted in evidence and has been heavily relied-upon in this Recommended Order. The surveillance film from the back of the bus was not offered or admitted.

38. Ms. Smith, and Ms. Rucell Nesmith, Petitioner's Operator Trainer/Safety Coordinator for Transportation, have each been involved in school bus transportation for over 30 years and both have served as drivers and as transportation administrators. They testified that Mr. O'Brien's conduct on October 5, 2007, violated Petitioner's policy on two basic levels: he left the driver's compartment while the bus was still running and still loaded with students, and he administered corporal punishment to a student.

39. While bus attendants and drivers have some discretion in handling disruptive students or students like A.R., who are not following directions, they are not supposed to permit, or cause, a bus to leave a stop until every student is properly secured, and they are forbidden to use corporal punishment.

40. Bus drivers/operators receive training, including training on Petitioner's Operations Handbook as well as training on the State-approved driver curriculum.

41. Mr. O'Brien was certified as having completed the bus driver training on July 20, 2001.

42. Mr. O'Brien attended annual in-service trainings thereafter in 2002, 2003, 2004, 2005, 2006 and 2007. In-service

trainings include, among other things, any updates to the Operations Handbook. General statements were also made during in-service trainings about not touching students.

43. Mr. DiPaolo received his initial training as a bus driver from Ms. Nesmith and a copy of the Operations Handbook in 2001, when he first was hired by Petitioner.

44. Mr. DiPaolo, and all bus attendants, receive initial training as bus attendants, including a review of Petitioner's Operations Handbook. Mr. DiPaolo also received in-service trainings thereafter in 2002, 2003, 2004, 2005, 2006, and 2007. In-service training included any updates to the Operations Handbook.

45. Ms. Smith recommended discipline for Messrs. O'Brien and DiPaolo. She recommended a five-day suspension for Mr. O'Brien and a three-day suspension for Mr. DiPaolo.

46. Petitioner scheduled a pre-disciplinary meeting concerning the incident for October 17, 2007. The meeting was postponed because Messrs. O'Brien and DiPaolo had obtained legal counsel. The meeting was eventually rescheduled for November 2007. Messrs. O'Brien and DiPaolo attended that meeting with their respective legal counsel, and it resulted in the November 7, 2007, charges addressed below and in the Conclusions of Law.

47. In accord with Ms. Smith's recommendation, Petitioner's Superintendent issued a letter dated November 7, 2007, to Mr. O'Brien, reprimanding him and issuing a five-day suspension without pay for leaving the driver's compartment; leaving the bus running while attending to A.R.; orally threatening to spank a student while attempting to put her into her seat; swatting the student on her posterior; and failing to immediately report to the Transportation Department the incident as a student safety issue. Mr. O'Brien was cited in the letter for violations of Petitioner's policies, namely Policy 6.37, Group III, Section (10)- On or off the job conduct which adversely affects the ability of the employee to perform his duties and/or the duties of other employees and/or adversely affects the efficient operation of the school system or any department, division, or area of the School Board; Policy 6.301, Ethics: Section (3) (a) failure to 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; and (3) (e) not intentionally expose a student to unnecessary embarrassment or disparagement; and provisions in Petitioner's 2007 Staff Handbook prohibiting touching students except to protect their health, safety and/or welfare. Policy 6.38 was cited as a disciplinary guideline.



48. In accord with Ms. Smith's recommendation, the Superintendent issued a letter dated November 7, 2007, to Mr. DiPaolo, reprimanding him and issuing a three-day suspension without pay, for failing to place a student assigned specifically to him for supervision and assistance in her seat; walking to the back of the bus while the bus driver had to secure the student in her seat; and failing to immediately report the incident to the Transportation Department as a student safety issue. Mr. DiPaolo was cited in the letter for violations of Petitioner's policies, namely Policy 6.37, Group II, Section (13), Incompetency or inefficiency in the performance of duties; Policy 6.37, Group III, Section (4), Interfering with the work of other employees or refusal to perform assigned work; and Policy 6.301: Ethics, Section (3) (a) failure to 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. Again, Policy 6.38 was cited as a disciplinary guideline.

49. The School Board's Operations Handbook, at page 37, states, in pertinent part:

Bus Aides

5. Drivers are to remain in the driver's compartment.

50. The School Board's Operations Handbook, at page 59-Y, states, in pertinent part:

Responsibilities of a School Bus Aide

1. To load and unload students and assist driver as needed.

\* \* \*

3. To ensure that all students are secured and when appropriate, secure restraining devices, i.e. seat belts, safety vest, infant seats, and toddler seats.

\* \* \*

6. To recognize individual student capabilities and exceptionalities while maintaining order on the bus and administer to their individual needs as required.

51. At page 59-D, the Operations Handbook provides, in pertinent part:

Operating Procedure No. 27,  
Responsibilities of the School Bus Driver  
Related to Board of Education Rules 6A-3

25. To report immediately to the director or supervisor of transportation, school principal or other designated officials:

a. Misconduct on the part of any student while on bus or under the driver's immediate supervision,

52. The Department of Education Bureau of Professional Practices Services' handout, provided during training of bus drivers, provides, in pertinent part:

INTERACTION WITH STUDENTS:

Keep hands and other parts of your body to yourself.

TIPS FOR STAFF WITH AGGRESSIVE STUDENTS:  
DON'TS:

1. Do not physically handle the student.
2. Do not react aggressively in return.

\* \* \*

5. Do not create punitive consequences to "get even" with the student.

Department of Education Recommendation:  
Discipline

The bus driver has no authority to slap, spank or abuse any child.

53. By School Board policy, Petitioner has made the standards for educators applicable to even its non-educational personnel, such as bus attendants and bus drivers. Policy 6.301 concerns employee ethics and provides in pertinent part:

(2) All employees shall familiarize themselves with the 'Code of Ethics of the Education Profession in Florida,' located in the State Board of Education Rules. All employees shall abide by the Code at all times and shall be held to the standards of the Code in all matters related to their employment with the Hernando County School Board.

54. Florida Administrative Code Rule 6B-1.006, which is provided to Petitioner's employees with their copy of Petitioner's Policy 6.301, provides in pertinent part:

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.

55. Petitioner's Policy 6.301 (3), reads:

The School Board of Hernando County supports strong internal control in its procedures and practices. All incidents of suspected improprieties should be reported using the Board approved Compliant [sic] Policy.

56. Petitioner's 2007-2008 Staff Handbook provides, in pertinent part:

TOUCHING STUDENTS

Employees are advised that they should not touch students in any way except for the protection of the health, safety, and/or welfare of a student or for protection of themselves.

57. School Board Policy 6.37 -- Group (II) provides, in pertinent part:

GROUP II OFFENSES

(13) Incompetency or inefficiency in the performance of duties.

58. School Board Policy 6.37 - Group (III) provides, in pertinent part:

GROUP III OFFENSES

(4) Interfering with the work of other employees or refusal to perform assigned work.

(10) On or off the job conduct which adversely affects the ability of the employee to perform his duties and/or the duties of other employees and/or adversely affects the efficient operation of the school system or any department, division, or area of the School Board.

59. The parties stipulated that this case does not present a situation of progressive discipline, and accordingly, the undersigned finds it unnecessary to quote or discuss the levels of discipline permissible under Groups II and III of Policy 6.37 or Policy 6.38.

60. It further appears that combinations of the penalties of written reprimand and suspension, with or without pay, are authorized, and each offense is looked at on a case-by-case basis. Also, it appears that all penalties listed in any School Board Policy are recommended, but not mandatory, to apply to specific offenses and that the penalty utilized is to be discretionary with management, per Policies 6.37, and 6.38. Policy 6.38, authorizes the Superintendent to suspend employees without pay for up to 10 days as a disciplinary measure.

#### CONCLUSIONS OF LAW

61. Petitioner has a contract with the Division of Administrative Hearings which establishes the Division's jurisdiction over the parties and subject matter of this cause.

School Board Policies 6.37, 6.39, and the HUSW Collective Bargaining Agreement, also apply. The hearing and Recommended Order have been conducted within the parameters of Sections 120.569 and 120.57(1).

62. The Superintendent of Schools for Hernando County has the authority, pursuant to Section 1012.27, Florida Statutes, to recommend to the School Board that any school employee be suspended and/or dismissed from employment.

63. Petitioner School Board has the authority to terminate and/or suspend support personnel without pay and benefits, pursuant to Sections 1012.22(1)(f) and 1012.40(2)(c), Florida Statutes.

64. The standard for discipline/suspension/termination of support personnel is "just cause," pursuant to Section 1012.40, Florida Statutes, School Board Policy 6.37, and the HUSW Collective Bargaining Agreement. Neither the HUSW contract nor School Board Policy 6.37 defines "just cause." Likewise, neither do the Florida Statutes provide an exhaustive definition of the term. In the absence of such specific definition, Petitioner has discretion (subject to review via a hearing) in setting standards which subject an employee to discipline and/or termination. See Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2nd DCA 1994).

65. It was stipulated that the duty to go forward and the burden of proof by a "preponderance of the evidence" in this cause is upon the School Board. See also McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2nd DCA 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3rd DCA 1990); see also, Section 120.57(1)(j), Florida Statutes.

66. Many rules, policies, standards, and educational/training devices etc. were admitted in evidence. However, Mr. O'Brien and Mr. DiPaolo may only be disciplined, pursuant to the charges actually brought against them in the respective disciplinary letters. (See Findings of Fact 47 and 48.) The other items, however, are helpful in determining how those charges are to be interpreted and applied in relationship to each man's actions or inactions that gave rise to the charges.

67. This presents some difficulty because both November 7, 2007, letters list in numerical form Policy 6.301 (3), which refers only to reporting incidents, and the language employed says the same thing. However, the language of the disciplinary letters clearly intended to also charge the Respondents with offending Policy 6.301 (2), which incorporates the Florida Administrative Code Rule applicable to educators. In fact, there is no sub-section (a) or sub-section (e) to Petitioner School Board's Policy 6.301 (3), as set out in the charging

documents. (Compare Findings of Fact 47-48, the respective charges, with Findings of Fact 53-55, the specific language of the School Board policies and Florida Administrative Code Rule, which does have a 3.a. and 3.e.)

68. Be that as it may, because the charging documents stated in plain English the contents of both School Board Policies 6.301 (2) and (3) and specifically quoted the actual language of sub-paragraphs a. (and, in O'Brien's case, e.) of Florida Administrative Code Rule 6B-1.006, even though the citations were somewhat garbled by not specifically referring back to Policy 6.301(2); because the discipline had already been imposed prior to the final hearing; because of the lengthy preparation period for final hearing; because of the fact that the Code rules were admitted without objection and were acknowledged as relevant by both Respondents; and because both the Proposed Recommended Orders of Petitioner, and at least the Proposed Recommended Order of Mr. O'Brien, addressed whether or not the ethical rules for educators applied in this case dealing with Respondents, who are non-educational personnel, and those proposals also addressed the "failure to report" issue, it is concluded that both Respondents had full notice of being charged under both Policy 6.301 (2), encompassing parts of the Florida Administrative Code Rule for educators, and under Policy 6.301 (3), dealing with immediate reporting to Petitioner's Department



of Transportation, and that each Petitioner had every opportunity to defend against those charges. Therefore, Respondent O'Brien was on notice with regard to Policy 6.301(2), encompassing Florida Administrative Code Rule 6B-1.006, 3. a. and 3. e., and Policy 6.301(3), for failure to report, and Respondent DiPaolo was also on notice with regard to Policy 6.301(2), encompassing Florida Administrative Code Rule 6B-1.006, 3. a., and Policy 6.301(3), for failure to report. Mr. DiPaolo was not charged with Florida Administrative Code Rule 6B-1.006, 3. e. in any way. Mr. O'Brien was also charged with touching contrary to the Staff Handbook.

69. First, what was not an offense: There was no "inappropriate touching," by either Mr. DiPaolo or Mr. O'Brien in any normally understood sense in attempting to seat and buckle-in A.R. Mr. DiPaolo's assisting the three-year-old child up the steps of the bus was part of his duties. Moreover, when that three-year-old child had a temper tantrum and slid onto the school bus floor, picking that child up and putting her in her seat was entirely reasonable and protective adult behavior by both men. However, Mr. O'Brien's swat is another matter. See, infra.

70. Likewise, there was no "cover up" by Messrs. O'Brien or DiPaolo. There was, however, a failure by each man to recognize what he had done wrong. Although there was no "cover

up", it is concluded that each man failed to "immediately report" the incident per School Board Policy 6.301(3), and the Operations Handbook requirements. Mr. O'Brien's conversation with A.R.'s teacher was insufficient to address the student safety issue with the Transportation Department.

Conclusions Specifically As to Respondent O'Brien  
DOAH Case No. 07-5362

71. On October 5, 2007, Mr. O'Brien pulled out into traffic without first ascertaining from Mr. DiPaolo that all the children were seated and secure. He was derelict in the performance of his duties by leaving the driver's compartment with the engine running, which created an unnecessary potential danger to the welfare of all the students on the bus. Mr. O'Brien also exceeded any authority he may have had to manage the bus by threatening A.R. within the hearing of other students, and then using corporal punishment to correct A.R. and/or to achieve compliance with his directives.

72. The Operations Handbook is clear that the driver is required to remain in the driver's compartment to ensure he maintains control over the bus and is available to react to any emergencies on the bus or situations created by other traffic. Although Mr. O'Brien may have believed he was acting in a safe manner when he left the driver's compartment to attend to A.R., his belief was misguided. He left the compartment unattended

while the bus was sitting on a busy road with rush hour traffic. He also had his back turned toward the driver's compartment while the engine was still running. Although this may have secured the door, it also provided an opportunity for a student to intentionally or accidentally release the brake and/or put it into gear in very quick fashion.

73. Mr. O'Brien had the option of calling upon Mr. DiPaolo, the bus attendant who had been assigned to the bus for the very purpose of assisting A.R. and making sure she was properly secured in her seat. He knew that the dedication by the School Board of a bus attendant to A.R.'s specific needs had to take precedence over his own supervisory stance for the entire bus.

74. Mr. O'Brien's interaction with A.R. was also outside the bounds of well-established School Board policy and procedures. The School Board Operations Handbook, Staff Handbook, and the State curriculum for bus drivers all indicate that spanking a child is prohibited. Even under the significant provocation of this child, and even if his swat to A.R.'s thigh/buttocks was well-intended or even mistaken, it was a clear violation of the Staff Handbook and Policy 6.301(2), encompassing Florida Administrative Code Rule 6B-1.006, 3.a. and e.

75. Just cause has been demonstrated to discipline Mr. O'Brien for violating Policy 6.37 Group III (10), Policy 6.301 (2), which adopts Florida Administrative Code Rule 6B-1.006 3.a. and e., and Policy 6.301 (3).

76. Leaving the controls unattended was a negligent act, and Mr. O'Brien's threat/swat were pro-active misuses of his position. The pro-active misuses of his position are cause for a higher discipline (five days suspension) than that assigned to Mr. DiPaolo (three days suspension).

Conclusions Specifically As to Respondent DiPaolo  
DOAH Case 07-5363

77. This is not an issue of Mr. DiPaolo seeking help from the administration and getting none or his "best" not being "good enough." October 5, 2007, was a situation of Mr. DiPaolo abandoning his job duties. As a school bus attendant, provided pursuant to A.R.'s IEP, he was, first and foremost, on the bus to ensure her safety and welfare, and only thereafter to assist the bus driver in regard to all the other bus students. One of the specific tasks Mr. DiPaolo was to perform for A.R. was securing her in her C.E. White seat. Although he made several unsuccessful attempts to buckle-in A.R., he abandoned his job responsibilities by going to the back of the bus for no urgent purpose, without buckling her in. At the bus stop, he could have called on the neighbor for help; he could have requested

Mr. O'Brien turn off the engine and help him; he could have requested that Mr. O'Brien radio the dispatcher. He did none of these things. He also did not notify Mr. O'Brien that Mr. O'Brien should not move the bus with A.R. unsecured. When he returned to the front of the bus, he did not assist Mr. O'Brien who had stepped into the breach, as it were.

78. Just cause has been demonstrated for disciplining Mr. DiPaolo for violating Policy 6.37, Group II (13); Policy 6.37 Group III (4); Policy 6.301 (2), which adopts Florida Administrative Code Rule 6B-1.006 3.a., and Policy 6.301 (3).

79. Mr. DiPaolo's three-day suspension is within management's discretion.

#### RECOMMENDATION

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

RECOMMENDED that Petitioner:

(1) Enter a Final Order sustaining Respondent O'Brien's reprimand and suspension without pay for five days; and

(2) Enter a Final Order sustaining Respondent DiPaolo's reprimand and suspension without pay for three days.

DONE AND ENTERED this 15th day of July, 2008, in  
Tallahassee, Leon County, Florida.



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ELLA JANE P. DAVIS  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 15th day of July, 2008.

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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.