STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLEEN R. WITHERS,)
)
Petitioner,)
)
vs.) Case No. 09-0710
)
ALACHUA COUNTY SCHOOL BOARD,)
)
Respondent.)
________________________________)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held on June 17, 2009, in Gainesville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Emily Moore, Esquire
Florida Education Association
300 East Park Avenue
Tallahassee, Florida 32301

For Respondent: Thomas L. Wittmer, Esquire
Alachua County School Board
620 East University Avenue
Gainesville, Florida 32601

STATEMENT OF THE ISSUE

Whether Respondent Employer committed an unlawful employment practice against Petitioner on the basis of her handicap.

PRELIMINARY STATEMENT

On June 20, 2008, Petitioner filed a Charge of Discrimination/Complaint with the Florida Commission on Human Relations (FCHR). On June 5, 2009, FCHR issued a Notice of Determination: No Cause. Petitioner timely-filed a Petition for Relief, and the cause was referred to the Division of Administrative Hearings (DOAH) on or about February 10, 2009.

DOAH's file reflects all pleadings, orders and notices intervening before final hearing on June 17, 2009.

At hearing, official recognition was taken of portions of the Code of Federal Regulations, provided to the undersigned in "hard copy." Petitioner testified on her own behalf and presented the testimony of Khalilah Pinkney, Shirley Ann Brown, Evelyn Lipham, and Dr. Elizabeth LeClear, and had Petitioner's Exhibits numbered 1-28, admitted in evidence, including the depositions of Dr. Lise Fox, Karen Fisher, and Dr. Charles E. Levy. Respondent presented the oral testimony of Dr. Elizabeth LeClear, Dr. Danielle Franco, Dr. Kenneth J. Osfield, Sandra Medeiros, David R. Mathis, Edward Gable, Joan Longstreth, and Cathy Black. Respondent had Exhibits numbered R1-R8 (all composites) and R9, Petitioner's deposition, admitted in evidence.

Upon joint motion, the undersigned toured relevant parts of Terwilliger Elementary School and its campus in the company of both counsel.

FCHR failed in its obligation to provide a means of preserving the record, but the parties had paid for a court reporter, and a Transcript was filed on June 30, 2009.

Each party timely-filed a Proposed Recommended Order on or before August 10, 2009, and each proposal has been considered in the preparation of this Recommended Order.

Unless otherwise indicated, all references herein to Florida Statutes are to the 2007 codification.

FINDINGS OF FACT

1. The parties have stipulated that: Respondent is a public school district and is the employer of Petitioner at Terwilliger Elementary School in Gainesville, Florida.

2. Petitioner has taught at Terwilliger for the past 12 years. Petitioner's evaluations have consistently met or exceeded Respondent's performance standards. For 11 years, until the 2008-2009 school year, her classroom was in Building Two, a multi-classroom structure on the northwest corner of the school. The instant controversy revolves around Petitioner's transfer to a detached, "portable" classroom for the 2008-2009 school year.

3. The parties have stipulated that: Petitioner, a teacher of Pre-K Exceptional Student Education (ESE) special needs students, has 36 years experience. Her classes comprise from seven to 14 students, ages three, four, and five. She has mobility impairment and uses a wheelchair.

4. Petitioner has post-polio syndrome, which limits her ability to walk. She uses a Pride Quantum 6,000 Power Chair, which the parties have stipulated is a rechargeable battery-powered wheelchair.

5. The District is pro-active in hiring and retaining qualified teachers who happen to be handicapped, and makes efforts to accommodate those handicaps. The credible evidence is that while there may be more severely handicapped teachers employed by the District, there are no other permanently wheelchair-bound teachers at Terwilliger and no teacher in the District fits her limitations, qualifications, and assignments point-for-point.

6. At the present time, Terwilliger has 89 employees, a faculty of 45 teachers and 560 students in Head Start and Pre-K through fifth grade, from age three through 13.

7. Terwilliger has two Pre-K teachers, one of whom is Petitioner.

8. The parties have stipulated that: Petitioner currently has an adult paraprofessional (aide) in the classroom with her.

9. Petitioner sometimes has had two aides, depending on the needs of the children in her class. At the present time in the 2008-2009 school year, she has only eight students in the portable. If the enrollment in Petitioner's class reaches eight to 10 students, a second aide might be necessary. Aides work with Petitioner and assist Petitioner by helping the children during the school day.

10. Sandra Medeiros, the principal at Terwilliger from 2000 through 2006, had planned to move both Petitioner and the other Pre-K teacher to self-contained portable classrooms 99-208L and 99-214L, in order for them to be nearer to the Head Start classrooms. The goal was to have the Head Start children interact more with the Pre-K children, so as to help the Pre-K students converse more (improve language skills) and so as to foster regular classroom behaviors. This process is called "inclusion" and is a respected educational goal on both the State and Federal levels. The move was planned for the 2006-2007 school year.

11. At some point, Ms. Medeiros discussed the move with Petitioner. In Spring 2006, Principal Medeiros had a ramp added to portable classroom 99-214L and had the bathroom enlarged with handrails, so as to render the new location accessible for Petitioner. Additional wiring was installed for a refrigerator and microwave.

12. However, Ms. Medeiros was transferred from Terwilliger in June 2006. At that time, Petitioner had not yet moved to the portable.

13. The new principal, Dr. Elizabeth LeClear, did not make any changes for her first school year at Terwilliger.

14. At Petitioner's annual evaluation conference in May or June 2008, Dr. LeClear explained to Petitioner that Petitioner would be moving to self-contained portable classroom 99-214L, located on the central east side of campus.

15. On June 20, 2008, Petitioner filed her Charge of Discrimination with FCHR, alleging a denial of reasonable accommodations and disparate treatment in the terms and conditions of employment.

16. On July 10, 2008, Petitioner completed a self-referral form and submitted it to Respondent, suggesting as a reasonable accommodation that Petitioner be permitted to remain in her current classroom assignment in Building Two.

17. Dr. LeClear relocated Petitioner and 25 other teachers in order to have the school organized by grade level, with every class in close proximity to the other classes and teachers of that grade level. She intended for the teacher "teams" to be together, in order to save time with student transitions to reading groups and to assist with teacher supervision. She also wanted the school to follow the District's Inclusion Model.

18. Respondent District permits and expects principals to change the use of spaces to meet current needs of their school, including fluctuating enrollments and evolving programs.

19. Terwilliger has six kindergarten classes. Those classes are now located in Building Two. The centrium, which is part of Building Two, is being converted to a computer and reading lab.

20. The portable assigned to Petitioner and her current eight students meets all mandatory standards for Pre-K classrooms including, but not limited to, its providing 35 square feet per child.

21. Other Florida school districts operate Pre-K classes in portables.

22. There are portables in use all over the school district. Like Terwilliger, almost every school uses one or more portables.

23. The pending move to the portable was stressful for Petitioner. Some of her stress and concern arose because she did not get written notification of the move until she had already left for vacation in June 2008.

24. The parties have stipulated that: Petitioner was on approved medical leave from August 11, 2008, through January 4, 2009. She returned from such leave in January 2009.

25. Not all the items Petitioner had acquired over the years and which had occupied parts of Building Two would fit in Petitioner's portable. Therefore, the move required that Petitioner select what she was taking with her and discard or store the remainder.

26. During the summer and fall of 2008, Dr. LeClear offered the help of the custodial staff to assist Petitioner in packing for the move to the portable and in physically moving the boxes.

27. Eventually, some of Petitioner’s items were taken to the portable; some were stored at Petitioner’s home; others were stored on Terwilliger’s campus; and still others were stored at another school.

28. Petitioner has not specifically requested more storage space than is provided in her new portable classroom, but if her class size increases to ten children, the administration would be willing to work with her on some compromise regarding storage.

29. Principal LeClear and Petitioner have had disagreements about what materials Petitioner may move from their ultimate storage spots into her portable classroom. At least once, the Principal has offered to go to the other school with Petitioner to reach a mutual agreement on those items, but Petitioner has not accepted her offer. At least once, the

Principal did not respond to Petitioner's written request concerning other items, and there is no clear explanation for the Principal's lack of response. However, these and similar situations are stressors amounting to simple miscommunications and misunderstandings but which do not reflect a deliberate failure of the Principal or the District to reasonably accommodate a handicap.

30. Petitioner wants to return to her old classroom in Building Two and to use an area in Building Two called the "centrium" as she has done for 12 years.

31. The crux of Petitioner's position is that she feels the portable "houses" her, but does not accommodate her in providing the quality program for her special needs students that she has taken pride in providing throughout her previous years at Terwilliger. This concern was echoed by parents and others.

32. Dr. Lise Fox, a professor in the College of Behavioral and Community Sciences at the University of South Florida, is a long-time friend of Petitioner. For years, Dr. Fox has used Petitioner and Petitioner's Building Two classroom as exemplars for her students training to teach special needs children.
Dr. Fox deposed that while Petitioner has run a model program for years, Petitioner's new environment (the portable) could be deficient by national standards for Individuals with

Disabilities Education Act (IDEA) and ESE students. Specifically, Dr. Fox was concerned that without the centrium, Petitioner has no indoor play area for development of her students' gross motor skills.

33. Dr. Fox could not say that any Americans with Disabilities Act (ADA) requirements were not being fulfilled in the portable, but she opined that the difference between what Petitioner was able to do as a teacher in Building Two and what she is able to do as a teacher in the portable amounts to the difference between a high quality Pre-K ESE program based on national professional standards and a program that is merely adequate by Federal and State requirements/standards. However, neither Dr. Fox nor anyone else espousing the foregoing view, were able to credibly state that Petitioner would not be able to fulfill her job requirements or pass her professional evaluations under her changed circumstances.

34. Building Two was in existence when Petitioner first came to Terwilliger. It was designed for early childhood education, which includes Pre-K and kindergarten. It is accessible under ADA standards. For several reasons, Petitioner considers Building Two more accommodating to her handicap and better for her ESE students than her portable.

35. Building Two contains several classrooms plus the "centrium." Petitioner's classroom in Building Two had an area

of 805 square feet. Petitioner's classroom in the portable has an area of 824 square feet.

36. The centrium was next to Petitioner's classroom in Building Two. Petitioner did not use the centrium for instruction, but she sometimes used it for occupational and physical therapy and as space where volunteers could work one-on-one with individual children. The other Pre-K teacher also used that area on occasion for similar projects.

37. Sometime in the past, Petitioner had received a grant to acquire stimulating educational and play materials for her classes. Technically, the items acquired at that time belong to Respondent District, but Petitioner properly retained them in her Building Two classroom, in its storeroom, and in the centrium, and utilized them under the terms of the grant. She also received District commendations for her acquisition of these items. However, after the grant ended, she continued to acquire more and more items on her own, to the extent that she had to clear paths in her classroom for her wheelchair to move through.

38. Her last year in Building Two, Petitioner used the centrium mostly for storing a myriad of Pre-K toys and plastic play equipment, many of which were not part of the curriculum, but all of which had been acquired by Petitioner through grants, garage sales, and donations. Some of the toys were dangerous,

due to deterioration or breakage. The sheer quantity of the material in that space concerned two successive principals, and the fire inspector.

39. A small office was next to Petitioner's former classroom in Building Two, as was a storage room, but neither was being used for instructional purposes at the time Petitioner was relocated to the portable. A kitchen space was next to Petitioner's former classroom, but its stove had been disconnected for safety reasons years before Petitioner's 2008 transfer. It was not demonstrated that a working kitchen is necessary for any of the curricula Petitioner teaches. There is no reason Petitioner cannot "socialize" children through food preparation/play without actually cooking in either Building Two or her portable, but the portable has been wired for a microwave and refrigerator.

40. The student restroom in Petitioner's previous classroom had a shower area and a washer and dryer. The shower, washer, and dryer were certainly convenient for dealing with small children, but they are not required features of a Pre-K program. At Terwilliger, the nurse's station has a tub and shower facility that can be used if one is needed.

41. Petitioner's Building Two classroom had a changing table; the portable does not. It is unclear whether Petitioner herself used the changing table in her old classroom. Pre-K

students may be too large/heavy for that type of assistance. It is possible, but not proven, that Petitioner's paraprofessional could provide that type of assistance. Petitioner's current class has smaller sized children than those in her team teacher's Pre-K class, but Petitioner did not prove that she can lift a child of either size onto a changing table from her wheelchair.

42. It is good practice to ask parents to provide a change of clothes for their Pre-K child to change into and for the school to send home the soiled clothes. It is not "best practice" to change a Pre-K child standing up, but it is a permissible practice.

43. The Building Two classroom had a restroom with "itty bitty" child-sized facilities and mid-range facilities. That restroom also had bars for little and mid-size toilets. The portable does not have the foregoing accommodations. The State of Florida does not require that a Pre-K classroom have a restroom, but the National Association for the Education of Young Children has a standard for a restroom being available within 40 feet of a Pre-K classroom, and either child-sized fixtures or a stepstool for the children to use adult-sized features. The portable meets these requirements.

44. Dr. Fox felt the potty-training facilities in the portable's rest room were inferior to those in Building Two, but

she acknowledged the portable’s restroom would serve if there were steps to the wash bowl, which there were, and if a child’s potty adapter were added.

45. The distance from Petitioner’s Building Two classroom to an adult restroom is about 70 feet.

46. The restroom within the portable to which Petitioner is now assigned is fully functional for Petitioner. It meets ADA standards, but the arrangement of one handrail is not optimal for Petitioner. Because Petitioner lifts with both arms instead of with her legs, a railing on each side of the toilet, instead of railings beside and behind the toilet, would be more convenient for her than the present railing arrangement. Rearrangement of the rear railing to one side of the toilet might be a formidable job, given the placement of the toilet, but that has yet to be determined, because Petitioner did not ask to have the rear railing moved from the back to the side prior to filing her Charge of Discrimination.

47. Petitioner’s assertion or suggestion that, contrary to school policy and safety planning, when she worked in Building Two, she usually parked in an area to which she was not assigned is irrelevant to her allegations herein of disparate treatment and failure to accommodate.

48. The distance from Petitioner’s former designated handicapped parking space to Petitioner’s former classroom in Building Two is 260 feet.

49. The distance from Petitioner's current designated handicapped parking space to the portable she now occupies is 470 feet, but it connects directly, via sidewalks. Most, if not all, of these sidewalks are under cover.

50. Sidewalks in the vicinity of Petitioner’s portable are arguably less smooth than those utilized around Building Two, but there is not a significant difference. Once, one of Petitioner's wheelchair wheels got caught on, or near, one of the sidewalks near the portable, and once Petitioner drove her wheelchair into a grate, but each time she was quickly extricated by other teachers and/or administrative staff.

51. At the present time, Petitioner’s portable has two doors and two ramps, one of which is covered to protect her from inclement weather. The type of door handles on the portable were changed from knobs to levers. These handles meet ADA requirements. Petitioner thinks the doors would be more convenient for her if they opened in, rather than out. If they opened in, it is possible that teaching space would be lost, and it is unclear whether exterior doors opening inward could still meet both ADA and Fire Code standards.

52. Respondent's ADA expert, Dr. Kenneth J. Osfield, did a site evaluation and testified that there are two exits out of Petitioner's portable for fire safety. This feature, the walkways to the ramps, the ramps with handrails, the entrances/exits, and the internal classroom space meet ADA requirements, and, as previously stated, the restroom is already handicapped-accessible for Petitioner per the ADA.

53. Dr. Osfield agreed with one of Petitioner's concerns which was also shared by Dr. Fox. Therefore, he suggested that Respondent place fencing around the base of each portable so that children could not crawl under them. He further suggested that Petitioner remove her decorative items from one ramp and the entrances/exits so that she could maneuver more easily.

54. In assessing the interior teaching space, the ADA expert found that Petitioner's space in the portable was nicely decorated and also was a nice learning environment, due to Petitioner's decorations and its general set-up. However, while her arrangement is attractive and acceptable to the School and District administrations, it presents access problems which are not presented by the open floor plan utilized in Petitioner's team teacher's smaller portable.

55. Petitioner's placement or angling of a table in her classroom immediately outside the portable's restroom, and her storage of other items in the restroom (large garbage cans,

chairs, boxes, etc.), make it difficult for her to maneuver her wheelchair there. Dr. Osfield was able to suggest ways to solve these problems, but they would require Petitioner's cooperation.

56. Charles E. Levy, M.D., the parent of a child who had been one of Petitioner's students seven years ago, deposed that, as a parent, he would be less comfortable and secure with regards to his child's learning and safety if his child were educated in the current portable classroom than he had been when his child was educated in Building Two. However, Dr. Levy observed only Petitioner's portable, not the other Pre-K portable, and even he attributed Petitioner's mobility problems in her portable classroom to significant physical barriers caused by her arrangement of the furniture.

57. Petitioner has chosen to retain more personal material and equipment than her team teacher has. The other Pre-K teacher has borrowed some of Petitioner's toys and learning devices and found them useful over the years, but she has not consistently used the quantity of items that Petitioner has.

58. Petitioner's teaching/learning material and equipment appears to the administration to be more material and equipment than is reasonably necessary to teach her class. It exceeds published guidelines, which some educators, including Petitioner, think is good, and which other educators think is not so good.

59. Recycling learning toys and equipment throughout the year and storing those not in use so as to keep children interested in them when they are brought out again has merit. Also, learning through new and innovative play has merit. However, there is no credible evidence that Petitioner's handicap requires that she either store or display such a large quantity of toys and equipment as she has chosen to retain. Fewer items or storage of some of her items would increase her mobility and render her more comfortable in the portable.

60. Petitioner's team teacher in the other, smaller portable has a less stimulating classroom but it operates functionally, and she and her students have been successful.[1]

61. No standard tests suggest that the students taught in the clear and functional portable are any less successful than those taught by Petitioner in the decorative and cluttered portable or vice-versa.

62. Petitioner's 2008-2009 school year students in the portable have evidenced the same amount of overall educational growth as did her 2007-2008 class in Building Two.

63. Terwilliger has several playgrounds. From Building Two, Petitioner regularly used the playground to the north of that building: North Play Area No. One. The paved area outside Building Two had been extended at Petitioner's request several years before, so that it would be accessible to two children

then enrolled who were wheelchair-bound. Petitioner also used this area.

64. Petitioner received a grant to put certain play items, like riding toys, in the North Play Area, and apparently also was commended for that initiative.

65. In the year immediately preceding the instant complaint, while in Building Two, Petitioner's class used North Play Area No. One, up to five times per week, and used the Head Start Play Area No. Two, between two and three times per week as part of the inclusion program.

66. That year, Petitioner's class used each playground under the sole supervision of Petitioner's paraprofessional or with the paraprofessional present in the sandy area with them and with Petitioner supervising from a nearby sidewalk or the paved area. Petitioner raised no complaints about this system before the move to the portable.

67. Both playgrounds are appropriate for Petitioner's students. However, the Head Start playground now assigned to her portable allows Petitioner's students the interaction/inclusion that the School's and District's administration desire.

68. The distance from Petitioner's Building Two classroom to Head Start Play Area No. Two is 460 feet. From Petitioner's

portable classroom to the Head Start Play Area No. Two is 280 feet.

69. Petitioner has access to a third playground, the "intermediate" or "school" playground, that has a sidewalk approach, where she can get closer to the children than she can at the Head Start Playground, but the more credible evidence supports her belief that she is now "assigned" to the Head Start Playground due to the administration's desire to foster interaction between the two types of classes.

70. Petitioner contended that her Head Start playground assignment is inaccessible for her wheelchair. In this regard, the greater weight of the evidence is that, using her wheelchair, Petitioner cannot get directly into the sandy area of either her old playground or the Head Start Playground.

71. Dr. Levy has become Petitioner's friend and adviser with regard to wheelchair functionality. He is the Chief of Rehabilitative Medicine at North Florida/South Georgia Veterans Health System. In his opinion, Petitioner's Pride Quantum 6000 wheelchair should work adequately for Petitioner over most grassy areas in sunny weather, but it will become bogged down in sandy or boggy areas.

72. On the date of hearing, Dr. LeClear also was temporarily using a power wheelchair due to a recent injury. In her wheelchair, she has reached the Head Start Playground on the

grassy area and the hard sand, but she conceded that her wheelchair will not go through the soft sand. She feels the sidewalk edge is sufficiently near for Petitioner to instruct the students with a paraprofessional closer to them. The perimeter of the school grounds is fenced, so child escape is not a viable issue.

73. Petitioner's old playground had sidewalks surrounding it and a paved area that allowed Petitioner's wheelchair to get closer to its outside play equipment, possibly at a better auditory angle, and the Head Start playground has a ring of grass between the sandy play area and the sidewalk where Petitioner must stop her wheelchair. However, in either location, Petitioner would have to rely on her paraprofessional to be with the children on the sandy surface that actually constitutes the playground area, because Petitioner's wheelchair does not move well through grass and/or sand.

74. Dr. Fox and Petitioner deplored Petitioner's inability to get within three feet of her students on the Head Start Playground. Although Petitioner particularly laments a loss of educational opportunity because she is not able to "pour sand" with her students under the new playground constrictions, it appears that there are sand and/or rice tables for pouring sand and/or rice located between two sidewalks near the base of one

of the ramps leading to her portable and that Petitioner’s wheelchair can access children and pouring activities there.

75. Any further modifications to either playground would change their character from “playground” to something else, and more concrete might create a danger for the children climbing on equipment near or above it.

76. Terwilliger’s Head Start playground is superior to some of the Pre-K playgrounds at other schools because it has a cover from the sun and more activities. It is suitable for the children involved; meets Pre-K standards; has newer equipment than the other playground favored by Petitioner; has fewer “pinch points”; and can be used by the special needs children now enrolled. The very fact that it has a larger sandy area than Petitioner’s previous playground seems to be a safety factor for the children involved.

77. The District had issued a February 6, 2007, written reprimand to Petitioner with regard to her having instructed a paraprofessional to allow a child with a traumatic brain injury to play on a jungle gym in one of the playgrounds. This reprimand was required by professional practices standards simply because a complaint had been made. The issue did not revolve around which playground Petitioner was using; it revolved around unfamiliarity of those on the scene with the particular child’s Individualized Education Plan (IEP). It was

an isolated incident and not representative of Petitioner’s general teaching abilities, personal responsibilities, or professional track record. However, the incident suggests that anything but sandy soil or rubber shreds for a playground can increase the danger inherent in any playground.

78. Fire drills, tornado or inclement weather alerts, and any other untoward incident might require evacuation of the portable classroom. Such evacuations are possible for Petitioner in her wheelchair. Under fire evacuation circumstances, Petitioner may have to stay on a hard surface nearer to the school than her students do, because of her wheelchair. There is no credible evidence that this situation puts Petitioner's students, who are accompanied and overseen by a paraprofessional, or puts Petitioner, in greater danger than any of them were in whenever they had to evacuate from Building Two.

79. Prior to litigation, Petitioner had never specifically requested that the sidewalks be extended closer to her new playground, that additional fencing be provided to keep children from “escaping” the school ground, that the District grade or otherwise alter the playground approaches for her, or that her evacuation routes be altered. Therefore, Respondent cannot be held liable for a failure to accommodate on these issues.

CONCLUSIONS OF LAW

80. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this cause, pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

81. Section 760.10, Florida Statutes, provides, in pertinent part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual with respect to compensation, terms, conditions, or privileges of employment because of such individuals race, color, religion, sex, national origin, age, handicap, or marital status. (Emphasis supplied.)

82. Respondent qualifies as an "employer" as defined in Section 760.02(7), Florida Statutes. Case law establishes that where an employer knows of a handicap, it must make reasonable accommodations so as to hire and retain a handicapped person.

83. Petitioner qualifies as a “handicapped person”. She asserts that the employer herein has discriminated against her through disparate treatment and by a withdrawal of reasonable accommodations for her disability.

84. The shifting burdens of proof in discrimination cases have been extensively examined in Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991):

> Pursuant to the [Texas Department of Community Affairs v.] Burdine, [450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)] formula, the employee has the initial burden of establishing a prima facie case of intentional discrimination, which once established raises a presumption that the employer discriminated against the employee. If the presumption arises, the burden shifts to the employer to present sufficient evidence to raise a genuine issue of fact as to whether the employer discriminated against the employee. The employer may do this by stating a legitimate, nondiscriminatory reason for the employment decision, a reason which is clear, reasonably specific, and worthy of credence. Because the employer has the burden of production, not of persuasion, which remains with the employee, it is not required to persuade the trier of fact that its decision was actually motivated by the reason given. If the employer satisfied its burden, the employee must then persuade the fact finder that the proffered reason for the employment decision was a pretext for intentional discrimination. The employee may satisfy this burden of showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief. If such proof is adequately presented, the employee satisfies his or her ultimate burden of demonstrating by a preponderance of the evidence that he or she has been a victim of intentional discrimination.

85. Petitioner asserts that by moving her to the portable classroom environment and assigning her to the Head Start playground, Respondent has taken actions adverse to her employment and has thereby withdrawn reasonable accommodations,

and that Respondent’s proffered reasons for the relocation of her classroom and reassignment of her children’s playground are pre-textual.

86. Herein, no evidence was presented that Petitioner was treated differently from her co-workers because of her handicap. Indeed, in the summer of 2008, a majority of Terwilliger’s teachers were moved to different classrooms. The school's other Pre-K teacher, who is not disabled, was also assigned to a portable classroom that is actually smaller than Petitioner’s portable but which is substantially its equivalent.

87. Respondent re-assigned 25 of the school's 41 faculty members for the 2008-2009 school year for functional, educational reasons. The new assignments are designed to permit members of each grade level team to be in close proximity so as to facilitate student transactions and interactions. Petitioner and others were relocated so that the classrooms in Building Two could be used to house six kindergarten classes and so that the centrium could be converted into a reading lab and computer center.

88. Petitioner was moved from a classroom that is ADA-compliant to another classroom that is ADA-compliant. Her new classroom has 824 square feet to the old classroom's 805 square feet. Her new classroom also has an ADA-compliant restroom within it. Before the move, she went to another playground up

to five times per week and to the Head Start playground two to three times per week, and now she goes exclusively to the Head Start playground between five and eight times per week. Pouring sand may have to be done in another location and a concrete slab is no longer available to help her get as close to the children on the Head Start playground as she could get to those on the other playground, but Petitioner has the same paraprofessional who performs the functions Petitioner has never been able to perform in the sandy and boggy areas of any playground.

89. Petitioner’s classroom is actually closer to the Head Start playground than before, and use of the Head Start playground supports the legitimate educational goal of "inclusion."

90. The only difference that could legitimately be called less accommodating to Petitioner is that Petitioner's currently assigned handicapped parking space is 210 feet further from her portable than her old parking space was from her old classroom. However, this change is offset by a direct, covered sidewalk. Also, the evidence does not support a conclusion that any other handicapped space would be closer to the new portable than the one currently assigned to Petitioner. On balance, such a minor inconvenience to Petitioner versus a more integrated physical plant for both the entire student body and the educational staff

cannot constitute a failure to “reasonably accommodate” Petitioner.

91. Petitioner’s reassignment to a portable classroom is a change of location only. She still has the same paraprofessional aide in the classroom, teaches the same curriculum, and has the same or a lesser number of Pre-K students. The move does not involve any change in Petitioner’s compensation, hours of work, or other terms of employment. There are slight differences in her facilities, but that is all.

92. The only accommodation Petitioner is willing to consider is a return to her old classroom, but that would not constitute a <u>reasonable</u> accommodation, because such an accommodation would disrupt the entire functionality of Terwilliger’s education system.

93. The issue herein is <u>not</u> whether the portable classroom provides a "Cadillac" education to pre-K ESE children. "Excellence in education" is a goal with which laymen, as well as educators, can identify, but it does not encompass perfection. School systems have to deal with cramped, if not wholly inadequate, budgets and seek "the biggest bang for their buck," while at the same time complying with IDEA, ESE, and ADA, among a myriad of other State and Federal laws.

94. Nothing in the term "reasonable accommodation" requires Respondent to provide precisely the work environment

Petitioner wants or to duplicate a work environment Petitioner unilaterally feels is ideal. The term must be construed to mean an accommodation that presently, or in the future, enables Petitioner to perform the essential functions of her job. Wood v. Green, 323 F.3d 1309 (11th Cir. 2003). A disabled employee cannot force an employer to make a particular accommodation if another reasonable accommodation is available and offered to the employee. Llanes v. Sears Roebuck and Company, 46 F. Supp. 2d 1300 (S.D. Fla. 1997). If the employer offers a reasonable accommodation, its obligation is fulfilled. The change of assignments/location herein does not prevent or newly inhibit Petitioner from performing the essential functions of her job.

95. Petitioner has failed to prove the third element of her prima facie case -- that she suffered an adverse employment action, or, alternatively, Respondent has provided valid, not pre-textual, reasons for its employment decisions.

96. Assuming arguendo, but not ruling, that Petitioner has proven a prima facie case, she has not proven that Respondent's reasons for moving her to the portable were pretextual.

97. As evidence that Respondent's stated reasons for her relocation are pretextual, Petitioner asserts that prior to the move, others, particularly Principal LeClear, were frustrated with the toys and "stuff" Petitioner had accumulated and left in her Building Two classroom and the centrium; that the

measurements submitted in evidence comparing the two classrooms are flawed because the centrium and other areas adjoining her Building Two classroom were not included in those measurements; and that Respondent offered, and had admitted in evidence, only a single isolated letter of reprimand within Petitioner's 12-year career at Terwilliger.

98. Petitioner is correct that the single letter of reprimand is isolated. However, that reprimand was not offered as one of Respondent's reasons for relocating/reassigning Petitioner to a portable. Respondent agrees that Petitioner is an outstanding teacher.

99. Respondent acknowledged that Petitioner sometimes used the centrium but Respondent's measurements of the classrooms were performed by an appropriately ADA-qualified expert, and Petitioner does not dispute the measurements of the respective classrooms. These measurements were appropriately offered by Respondent to demonstrate that the portable classroom meets ADA requirements and to show how the portable's space equates with the space in Petitioner's prior classroom.

100. As to the "stuff" issue, two principals' and a fire inspector's concerns over Petitioner's clutter were never offered by Respondent as reasons for the school-wide classroom reorganization, and it is unreasonable to speculate that such a massive reorganization, together with the financing and creation

of a new computer and reading lab, would be undertaken just to oust Petitioner, her equipment, and her materials from the centrium. Assuming, arguendo, but not ruling, that such a motive existed, the possession by Petitioner of such articles was not proven to be essential to Petitioner's accomplishing her job duties, and the Principal even found storage space for Petitioner's articles.

101. Petitioner has not borne her ultimate burden of proof.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a Final Order dismissing the Petition for Relief and its underlying Charge of Discrimination.

DONE AND ENTERED this 13th day of October, 2009, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of October, 2009.

ENDNOTE

[1/] The other Pre-K teacher testified that she, personally, could not maneuver or teach in a wheelchair in her portable because she had never used a wheelchair and because the bathroom in her portable was too small and not ADA-compliant. She did not know if she could use a wheelchair in Petitioner's portable.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.