

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS)
COMMISSIONER OF EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 10-10022PL
)
DIANA O'NEILL,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on January 25 and 26, 2011, in Sarasota, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ron Weaver, Esquire
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For Respondent: Anthony D. Demma, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether just cause exists to sanction Respondent, Diana O'Neill (hereinafter "O'Neill"), for violation of Florida Statutes and Florida Administrative Code

Rules governing the conduct of teachers in the State of Florida, and, if so, what sanction(s) should be imposed.

PRELIMINARY STATEMENT

An Administrative Complaint was issued by Petitioner, Dr. Eric J. Smith, as Commissioner of Education (hereinafter the "Department"), on April 2, 2010. The complaint alleges violations of specified statutory and rule provisions by O'Neill relative to her status as a teacher during the 2007-2008 school year (the "School Year"). O'Neill timely filed an Election of Rights in response to the complaint, indicating her desire for a formal administrative hearing.

At the final hearing, the Department called the following witnesses: Patricia Sherknus, mother of a student; Kathryn DiPiero, mother of a student; Deborah Hatfield, mother of a student; Tamara Lynn Cooke, teacher's aide; Cindi Anderson, teacher's aide; Shirley Shaw, physical therapist; Mary Pillsbury, registered nurse; Lora White, superintendent of Sarasota County Schools; and Theresa Baus, principal at Venice Elementary School (the "School"). The Department's Exhibits 1, 2 and 6 were admitted into evidence.

O'Neill called four witnesses: Jacquelyn Ramsay, teacher's aide; Joyce Shattuck, teacher's aide; Theresa Miers-Pandolfi, speech and language pathologist; and O'Neill. O'Neill's Exhibits 1 and 3 through 7 were admitted into evidence.

(All hearsay evidence was admitted subject to corroboration by competent, non-hearsay evidence. To the extent such hearsay evidence was not corroborated or did not support other competent evidence, it will not be used as a basis for any finding herein.)

The parties advised the undersigned that a transcript of the final hearing would be ordered. They were given 20 days from the date the transcript was filed at the Division of Administrative Hearings to submit proposed recommended orders. The Transcript was filed on February 23, 2011. The parties then requested and were granted leave to file their post-hearing submissions on or before April 4, 2011. Each party timely submitted a Proposed Recommended Order, and both parties' submissions were given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is responsible for overseeing all teachers and staff members of public schools in the State of Florida. It is the duty and responsibility of the Department to ensure that all teachers follow the rules of professionalism and conduct set forth in the Florida Statutes and the Florida Administrative Code. The Department issues a teaching certificate to each instructor employed by a school and has the

right to sanction teachers for wrongdoing. Sanctions may include revocation of the teaching certificate.

2. At all times relevant hereto, O'Neill was employed by the School as a teacher for severely and profoundly mentally handicapped children. During the School Year, O'Neill had five or six students in her classroom. Relevant to the discussions herein, three of those students are identified as O., A., and T.

3. O'Neill has a master's degree in curriculum and instruction, a bachelor's degree in science and education, and a certification in elementary and special education. She has been certified as a teacher in Florida for over 21 years. She was hired by the School in 1990 and taught mentally handicapped children there without interruption until January 29, 2008. In all the years O'Neill taught at the School, she received only superior evaluations and had never been subject to discipline.

4. During the School Year, however, there were a number of complaints made against O'Neill by her classroom teacher's aides that resulted in O'Neill's suspension and removal from the classroom. Those allegations form the basis of the Department's decision to impose sanctions against O'Neill.

The Students

5. O. was seven years old during the School Year. At ten weeks of age, O. had been diagnosed with a genetic heart disorder which necessitated open-heart surgery. As a result, O.

is developmentally delayed and has severe hearing loss and some negative vision issues. O. understands some of the things going on around her to a limited degree. She says only one word, "Go," and cannot generally communicate with others. She laughs at certain things, feels pain, and is only slightly ambulatory. O. is not toilet-trained and has no sense of danger or awareness of potential harm around her.

6. A. was eight years old during the School Year. He has an atypical type of Downs Syndrome, i.e., while he does not have the physical appearance of a Downs Syndrome child, he does have the low muscle tone. A. was only beginning to learn to walk during the School Year, but he could see and hear well. He is not toilet-trained and needs assistance with all aspects of his daily activities. When he began walking, A. utilized a standard walker, then graduated to a pull-behind walker that helped him stand more upright. When A. would tire of walking, he would simply drop to the ground wherever he was at that moment. Due to some gastro-intestinal problems, A. had a G-Tube port surgically inserted in his stomach. The G-Tube port must be cared for in order to prevent infection.

7. T. is a profoundly mentally handicapped girl, who was 11 years old during the School Year. She has a condition called hemimegalencephaly and experiences seizures. T. has only minimal vision and cannot walk or talk. She can hear sounds and

directions and is able to move her hands and arms. When she was very young, T. underwent an operation called a hemispherectomy that resulted in a row of stitches across her entire skull. The area around the stitches is very sensitive, and T. dislikes having her head touched for any reason. During the School Year, T. was placed in a device called a "Stander" that allowed her to stand upright for limited periods of time. She seemed to like the Stander and her parents approved of it, but that device is no longer used at the School. Due to the extensive nature of her condition, all therapies for T. have been discontinued.

The Classroom

8. O'Neill's classroom during the School Year was set up so that she could deal with the various issues confronting severely mentally and physically handicapped children. The classroom contained restrooms for toileting the children and various equipment and furnishings to assist in their educational training. The primary focus for O'Neill was to develop as much independent functioning for the students as possible based upon their individual abilities. None of the students in O'Neill's classroom was able to understand even rudimentary academic work, so the focus was on various daily living needs.

9. There were two teacher's aides in the classroom during the School Year: Cooke and Anderson. Cooke was basically trained as an aide, beginning with her first position in 2004.

She attended college for three years, but did not graduate. She also worked with O'Neill during the 2006-2007 school year, i.e., the year immediately prior to the period at issue in this proceeding. Anderson had previously worked in O'Neill's classroom in the 2004-2005 and 2005-2006 school years. Anderson worked at a different school in the 2006-2007 school year. When Anderson elected to return to the School in 2007, O'Neill (who was the union representative at the School), provided her with some assistance. The degree or kind of assistance is disputed, but it is clear that O'Neill did not object to Anderson returning as her aide.

10. Both aides in O'Neill's class respected her and believed she knew how to teach mentally handicapped children. Both admitted learning a lot from O'Neill. The aides, however, were somewhat intimidated by O'Neill, ostensibly due to O'Neill's status as a union representative. There does not appear to have been any social interaction between O'Neill and the aides outside of the school setting.

11. It was the duty of the aides to assist O'Neill in the classroom. O'Neill gave them certain tasks and expected the aides to perform them independently and effectively. O'Neill created a kind of calendar setting forth each aide's duties on a weekly or monthly basis. The aides would perform many of the same tasks done by O'Neill, and there appears to have been a

generally amiable relationship between the women during the first part of the School Year.

12. In addition to the aides, there were other adult visitors to the classroom. One of the students had personal nurses who would come into the classroom on a regular basis to care for the child. Physical therapists, occupational therapists, speech and language pathologists, and other teachers, as well as the School principal would be in the classroom at any given time.

13. The room itself had two doors, one that opened up to the hallway and one that connected the classroom with a large therapy room. Neither of the doors was kept locked on a regular basis, but sometimes the door to the hallway would be locked if someone forgot to physically unlock it in the morning. There was a window out to the hallway, but that window was covered up with equipment and the blinds closed at all times.

O'Neill's Actions

14. In the first half of October 2007, during the School Year, O'Neill decided to attempt the use of a gait belt on A., based on A.'s actions. He would often refuse to cooperate when moving from the classroom to another room, he would sometimes wander off, and he would often just sit down wherever he was. A gait belt is a strap that can be secured around the torso of an individual and used as a means of assisting the person when

they are walking. Gait belts are used on physically handicapped individuals, the elderly, and children. A. had become less cooperative as he became more ambulatory, and he would often attempt to elope instead of returning to the classroom. O'Neill believed that a gait belt would be helpful in this regard.

15. One day as the lunch period was ending and the class was preparing to return to the classroom, O'Neill wrapped the gait belt around A., just below his armpits. She did not put the belt lower, because she was being careful to avoid A.'s G-Tube site. As she held the door open for other children, she felt A. starting to slip away and held the belt taut so as to keep him from eloping. At this point, the descriptions of the event differ greatly between O'Neill and the aides.

16. O'Neill says she felt the belt get taut, then looked down and saw that A. had lifted his feet off the ground by bending his knees. She then lowered him to the ground and directed him to stand. At the same time, she lifted up on the belt to assist him with rising up. Once he was off the ground, however, he refused to unbend his knees, and she was essentially holding him up in the air again. She lowered the belt and again ordered A. to stand up. She raised him up a third time, but he still would not cooperate. Frustrated, she removed the belt and got A. to return to the classroom by manually picking him up every time he dropped to the ground.

17. Cooke remembers A. being placed in the gait belt. As O'Neill had said, A. was not being cooperative. However, in response to him falling to the ground, O'Neill began to yank the belt--and A.--up and down like a yo-yo, yelling at A. the entire time. The situation made Cooke very uneasy, and she thought O'Neill's actions were improper.

18. Anderson remembers O'Neill warning A. that if he did not begin to walk back to the classroom, she (O'Neill) would get the gait belt. A. would sit, O'Neill would "boot him in the bottom," and he would only move a little. So, O'Neill eventually got out the gait belt and put it on A. She then started yanking A. up and down by the belt "like a yo-yo." Anderson told O'Neill to stop because she believed O'Neill's actions were improper. O'Neill laughed at Anderson, but she also stopped yanking on A.

19. There was some evidence of abrasions or bruises on A. at about the time of the incident, but the testimony was insufficient to prove that the marks were caused by the gait belt.

20. The testimony of the two aides is more credible based upon their corroboration of each other, their absence of pecuniary interest in the matter, and their demeanor. This is not to say that O'Neill does not remember the event exactly as she described it, only that the description provided by the

aides seems more believable in consideration of all the testimony.

21. During the School Year, O'Neill began to strike the students with various objects, e.g., a water bottle wrapped in a koozie, a tennis ball sleeve wrapped in carpet, a small catalogue or magazine, and a cardboard sign covered with a piece of carpet. O'Neill referred to the striking as a "bop" on the head or arm, done lightly and solely for the purpose of getting the child's attention or playing with them. Again, the aides' perception differs. They remember the strikes to be much heavier in nature, done in anger or frustration. There is no way to ascertain with any degree of certainty as to how O'Neill used the objects on the students.

22. T. had one physical condition that is of significance to this matter. Due to her physical development, T.'s bottom lip would often become dry and flaky. It was necessary to keep ointment on her lip and to carefully cut off the dried skin at times. T.'s grandmother would often come to the school and take care of that task.

23. On at least one occasion, but likely more than once, O'Neill pulled the dried skin off T.'s lip, rather than remove it with scissors. O'Neill admits to pulling the skin off during a school year prior to the year at issue. She says it was done because she did not want T. to go out in public with an

aesthetically displeasing appearance. Cooke, however, remembers numerous instances during the School Year in which O'Neill would "yank [the skin] right off her mouth." T. would utter a cry of pain, and O'Neill would simply laugh as if it were a funny thing she had done. Cooke said T.'s mouth would bleed when this happened, but T.'s mother did not testify as to whether she saw evidence of bleeding when T. came back from school.

24. O'Neill would also be somewhat caustic in her comments about the students. She often referred to O. as "Oblivia" and said T. was "just sitting there, using up oxygen" (or something to that effect). When an aide raised questions about striking the children with objects, O'Neill said something akin to, "So what, am I going to cause them brain damage?" O'Neill admits that her language was sometimes curt and that she used dark humor in order to deal with a very stressful job. She denies ever saying anything meant to harm or demean the students she taught.

25. O'Neill struck one student, T., on one occasion, although the exact nature of the event is disputed. One day while attempting to instruct T. how to distinguish between food and drink, O'Neill got frustrated. Despite O'Neill's best efforts, T. would not cooperate by selecting the appropriate picture placed in front of her. After numerous attempts, O'Neill finally gave up and brushed her hand against T.'s head.

O'Neill described the action as a soft brushing of T.'s hair; the aides remember it differently. They describe O'Neill actually hitting T. with a backhand motion, striking her with sufficient force to make T.'s head move suddenly. The aides saw that event as egregious enough to report immediately and went straight to the principal's office.

26. The aides' reporting of the incident with T. was, in their view, necessary in order to prevent O'Neill from further inappropriate behavior. While they had been reticent to report O'Neill earlier because she was a union representative and held some degree of authority over them, they finally had seen too much. The aides had reported O'Neill's behavior to the school nurse earlier. After that report, O'Neill stopped her questionable behaviors for a while. The behaviors returned however, and apparently got worse.

27. In response to the report, the principal placed O'Neill on administrative leave pending an investigation. She had been aware of prior alleged incidents involving O'Neill, but did not take any action at that time as it appeared the situation had been resolved by the aides' reporting to the nurse. However, the latest incident, an alleged assault on a student, required immediate action. As a result of her investigation, the principal then withdrew O'Neill permanently from the classroom.

28. O'Neill has a long history of working with mentally handicapped students. She started work in this area while still a high school student and became enamored with the subject from the beginning. In addition to her teaching duties, O'Neill has also done extensive volunteer work with the special needs students. It is quite obviously her passion.

29. O'Neill is married and has a stepson. Her mother now resides in the Sarasota area. She does not acknowledge any particular stressors in her life during the School Year, but her behavior indicated otherwise. Besides the aforementioned actions concerning her students, O'Neill's interaction with other professionals was also somewhat strained. At least one professional consultant who interacted with O'Neill during the School Year reported that she was less flexible and agreeable than in the past. O'Neill's aides saw a great difference in her demeanor and behavior in that year versus prior years.

30. O'Neill denies feeling "burned out" during the School Year, but there are numerous indicators to suggest that her behavior had changed. The nature of her actions, vis-à-vis her students, who she seemed to love, suggests a high degree of stress. Her behaviors during the School Year were so different from her historical style that something must have been amiss in her life.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. The proceedings are governed by sections 120.57 and 120.569, Florida Statutes (2010). Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2010 codification.

32. The Department has the authority to investigate and prosecute alleged violations of section 1012.795(1), Florida Statutes, which states in pertinent part:

The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for up to 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for up to 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon an order of the court or notice by the Department of Revenue relating to the payment of child support; or may impose any

other penalty provided by law, if the person:

* * *

(c) Has proved to be incompetent to teach or to perform duties as an employee of the public school system or to teach in or to operate a private school.

* * *

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

* * *

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

(k) Has otherwise violated the provisions of law, the penalty for which is the revocation of the educator certificate.

(l) Has violated any order of the Education Practices Commission. . . .

33. Florida Administrative Code Rule 6B-1.006 states in pertinent part:

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

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

(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.

34. The Department is acting pursuant to its authority in seeking to terminate O'Neill's teaching certificate based on alleged violations including, inter alia, exposing her students to unnecessary embarrassment or disparagement and failing to protect them from physical harm.

35. Because this case involves the potential loss of a license to engage in a business or livelihood, the Department is required to prove all elements of the violations charged by clear and convincing evidence. Dep't of Banking and Fin., Div. of Sec. and Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932, 933 (Fla. 1966); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The clear and convincing evidence standard is succinctly described in Evans Packing Co. v. Dep't of Agric. and Consumer Serv., 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), as:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts and issues. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy as to the truth of the allegations sought to be established.

36. As set forth above, the testimony of each of the witnesses was deemed credible and each witness seemed to distinctly remember the events in question, although their memories were divergent in some respects. It does not appear that any of the witnesses (including O'Neill) was stating anything other than their truthful perception of the events that occurred. Each of the Findings of Fact set forth above is based on clear and convincing evidence.

37. Inasmuch as the events were described differently by the witnesses, it can only be surmised that although each of them was telling the "truth" as they remember it, the actual truth may be something else altogether. It is the belief of the undersigned Administrative Law Judge that O'Neill used less than professional language about her students, caused objects to come into contact with her students' heads, used a gait belt on one student, and brushed another student's head with her hand. However, it is also clear that O'Neill had no intention of

hurting her students or abusing them in any way, although her actions had that affect.

38. From the totality of the clear and convincing evidence presented at final hearing, it is clear that O'Neill engaged in activity during the School Year that could seriously reduce her effectiveness as a teacher if such behavior continued. However, O'Neill's history and obvious passion for working with severely handicapped children militate against permanent revocation of her teaching certificate. While there is evidence of misconduct in office by O'Neill, as contemplated by statute, the misconduct was isolated to a relatively short period of time and appears to have been caused by stress or other factors.

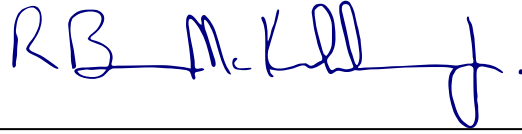
39. There is, therefore, insufficient clear and convincing evidence to establish the proposition that permanent termination of O'Neill's teaching certification is warranted.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Dr. Eric H. Smith, Commissioner of Education, imposing upon Respondent, Diana O'Neill, the following penalty: Suspension of Respondent's teaching certificate through the end of the 2010-2011 school year, followed by two years of probation.

DONE AND ENTERED this 27th day of April, 2011, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
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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.