



STATEMENT OF THE ISSUE

As stipulated by the parties, the issue in this case is whether there is "just cause" to terminate the employment of Patricia Davis.

PRELIMINARY STATEMENT

Petitioner, St. Lucie County School Board (School Board), employed Respondent, Patricia Davis (Ms. Davis), as a bus aide. As a result of an incident on February 8, 2010, it determined to terminate her employment.

On October 21, 2010, the School Board issued a letter that recommended termination of Respondent as a paraprofessional bus aide due to allegations of "just cause", pursuant to section 1012.40(2), Florida Statutes (2010),<sup>1/</sup> and the applicable Collective Bargaining Agreement.

The School Board maintains that Ms. Davis violated:

1. School Board rule 6.301(3)(b)xii., by neglect of duty;
2. School Board rule 6.301(3)(b)xix. by violating any rule, policy, regulation, or established procedure;
3. School Board rule 6.301(3)(b)xxv., by sleeping during working hours;
4. School Board rule 6.301(3)(b)xxvi., by violating safety rules;
5. School Board rule 6.301(3)(b)xxix., by violating the Code of Ethics of the Education Profession, the Principles of Professional Conduct for the Education

Profession, the Standards of Competent and Professional Performance, or the Code of Ethics for Public Officers and Employees.

6. The Code of Ethics of the Education Profession in Florida, Florida Administrative Code Rule 6B-1.001(2), by failing to exercise the best professional judgment and integrity.

7. The Code of Ethics of the Education Profession in Florida, Florida Administrative Code Rule 6B-1.001(2), by failing to always have the concern for students as her primary professional concern.

8. The Code of Ethics of the Education Profession in Florida, Florida Administrative Code Rule 6B-1.006(3)(a), by failing to make a reasonable effort to protect a student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

On November 8, 2010, School Superintendent Michael Lannon (Mr. Lannon) advised Ms. Davis in writing of his intent to recommend termination of her employment to the School Board. Mr. Lannon suspended Ms. Davis without pay effective November 9, 2010. The School Board accepted the recommendation.

On December 1, 2010, Ms. Davis petitioned for an administrative hearing to contest her termination. She seeks reinstatement, back pay, and a clear performance record as her remedy.

On December 16, 2010, the School Board referred the petition to the Division of Administrative Hearings to conduct a

hearing. The School Board also issued and filed a Statement of Charges and Petition for Termination on December 16, 2010.

The hearing was scheduled for March 17, 2011. During the course of this proceeding, the parties filed a total of 21 motions and other documents addressed to discovery issues, which were ruled upon. On February 23, 2011, the undersigned granted Ms. Davis' Motion for Continuance based upon medical emergencies in counsel's immediate family. The hearing was re-scheduled to May 24, 2011. On April 27, 2011, Ms. Davis filed a combined Motion to Compel, for Sanctions, and for Continuance. The School Board opposed it. Ms. Davis' request for a continuance was based upon delays due to the continuing discovery disputes. The continuance was denied. On May 12, 2011, Ms. Davis filed a renewed Motion for Continuance, again based on the long-running discovery disputes. An Order of May 13, 2011, granted the motion. The case was re-scheduled to August 16, 2011. On June 10, 2011, the School Board moved to continue the hearing. The motion was denied. The hearing convened August 16, 2011, as scheduled.

The School Board presented the testimony of Maurice G. Bonner, Dr. Robert John Brugnoli, Donald R. Carter, Paul Gavoni, Frank Krukauskas, Michael J. Lannon, John David Morris, Kathleen Noble, Susan Ranew, and Bill Tomlinson. School Board Exhibits 1, 5, 7, 8, 11 through 22, 24, 25, 27 through 29, 31 through 35,

38, 41, 42, 44, 53, 55, 56, 73, and 77 through 81, were received into evidence.

Ms. Davis presented the testimony of Dr. Stephen Alexander and Marvel Ann Figueroa. Ms. Davis also testified. Ms. Davis did not offer any exhibits into evidence.

The Transcript was filed September 16, 2011. Both parties timely filed proposed recommended orders. They have been fully considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. The School Board employs Ms. Davis as a bus paraprofessional. Ms. Davis has satisfactorily served the School Board as a bus paraprofessional for approximately ten years, without any significant discipline.

2. Ms. Davis is a continuing status employee.

3. Ms. Davis is covered by the CTA-CU bargaining unit Collective Bargaining Agreement (CBA).

4. During the 2009-2010 school year, until February 8, 2010, Ms. Davis was assigned to regularly work on bus number 2407. Ms. Marvel Ann Figueroa was the driver regularly assigned to bus number 2407.

5. During the 2009-2010 school year, Ms. Davis was assigned to supervise Exceptional Student Education (ESE) students during transport to and from school on bus number 2407.

6. During the 2009-2010 school year, until February 8, 2010, C.P.<sup>2/</sup> was regularly transported on bus number 2407, to and from Palm Pointe Educational Research School (Palm Pointe). C.P. is a student with autism.

7. During the 2009-2010 school year, until February 8, 2010, C.P. was under Ms. Davis' supervision during transport on bus number 2407.

8. Ms. Davis was aware that C.P. was non-verbal.

9. Ms. Davis recognized that student C.P. was an ESE student with autism.

10. Ms. Davis knew that C.P. was required to use a safety harness/E-Z vest during transport.

11. As required by School Board rules, C.P.'s Emergency Information ESE Bus Form was provided to the staff on bus number 2407, and located on the bus on February 8, 2010. The form provided minimal information. It provided family information and contact numbers. A block labeled "Non-verbal" is checked. In a space labeled "Special instructions for Dealing with Student," one word appears: "Autism." In the "Special Bus Equipment" section, "E-Z on Vest" is checked.

12. School officials knew that within the past two years C.P.'s behavior included vigorous head banging. They also knew that within the past two years C.P. had worn a protective

helmet. C.P.'s educational plans included techniques developed to manage head banging and other self-injurious behavior.

13. The school did not inform Ms. Davis of the history of head banging or of the risk of the behavior. This information did not appear on the ESE form.

14. The School Board did not provide the bus with a helmet or other protective or cushioning gear.

15. On February 8, 2010, Ms. Davis was working on bus number 2407.

16. On the morning of February 8, 2010, before boarding students, Ms. Davis performed the pre-trip inspection required by her job duties. It included verifying that the seat belts were securely attached to the seats and that all seat belts were in working condition.

17. Ms. Davis was not feeling well that morning. But she chose to work rather than call in sick. This was poor judgment that contributed to the events of the morning.

18. Ms. Davis and the driver, Ms. Figueroa, discussed Ms. Davis' illness. They agreed that Ms. Figueroa would get off the bus to escort the children to their seats. This service was a responsibility of Ms. Davis, the bus paraprofessional.

19. On the morning of February 8, 2010, Ms. Davis sat at the front of the bus. Her training and instructions said that the aide was to sit at the back of the bus. But the

Transportation Director had repeatedly approved seating charts for the bus that showed Ms. Davis sitting at the front.

Consequently, the School Board had authorized Ms. Davis to sit in the front.

20. Ms. Davis' job duties also required her to constantly monitor the students. Although Ms. Davis periodically looked around to check on the students, she did not maintain a constant view of them. Due to her illness, Ms. Davis struggled to stay awake. Her head nodded and her eyes periodically closed momentarily. Ms. Davis was fighting sleep. She never fell completely asleep. But she did not maintain constant observation of the students.

21. C.P. and three other students were riding bus number 2407 on the route to Palm Pointe the morning of February 8, 2010.

22. Ms. Figueroa properly placed C.P. in his E-Z vest and secured him by his harness in the middle seat of his bus seat row. He was not seated beside the window.

23. During the ride to Palm Pointe, C.P. became upset. He began engaging in self-stimulatory behavior, looking out the window, shaking his hands, and rocking back and forward in his seat. The self-stimulatory behavior was intermittent.



24. This behavior, while often and typically exhibited by autistic children, was more vigorous behavior than C.P. had previously exhibited while riding the bus.

25. As the drive to Palm Pointe continued, C.P. began to hit his hands and then his head against the side of the bus and the bus window. He rocked back and forward in his seat. He leaned and rocked from side to side as he banged his head on the bus window. This behavior continued for about eight minutes.

26. Before that day, C.P. had never exhibited those behaviors while riding the bus. On February 8, 2010, C.P. had been riding bus number 2407, since the beginning of the school year, about six months earlier.

27. Ms. Davis and the bus driver noticed the behavior quickly. They were very concerned about C.P.'s behavior and safety, as well as the safety of the other children on the bus. The bus driver could not pull over, because of the traffic conditions and restrictions resulting from the roads on which she was driving.

28. Ms. Davis did not move C.P. farther away from the window. Unfastening C.P. from his harness and attempting to move him would have been dangerous for him and for the others on the bus.

29. Ms. Davis and Ms. Figueroa were panicked and frightened. They discussed what steps they could take. They

were hesitant to physically approach C.P. because they remembered being told in training that physical efforts to control a child with autism would likely cause them to become more violent.

30. Ms. Davis' training required her to seek help from a manager if she did not know how to handle a situation. Throughout the bus ride on February 8, 2010, as the situation worsened, Ms. Davis never used the available cell phone to seek assistance from a manager.

31. Near the end of the ride, C.P.'s head banging broke the window and cut C.P. He began bleeding, but not profusely.

32. Ms. Davis got the phone number of C.P.'s mother from the ESE form and called her. C.P.'s mother asked them to continue to the school and said she would meet them there.

33. Ms. Davis' call for assistance came too late. Her failure to promptly seek assistance was a neglect of her duties and a failure to exercise sound professional judgment.

34. As the bus pulled in and stopped at the school, C.P. calmed. Ms. Davis approached him and comforted him verbally and physically. Other school employees boarded the bus and escorted C.P. off where his mother met him.

35. The emergency intervention duties of a bus paraprofessional, like Ms. Davis, include providing ESE students physical assistance, if needed, during an emergency.

36. Ms. Davis had seen C.P. mildly agitated before February 8, 2010. But there is no persuasive evidence that his actions included banging his head against the window or anything else, or that he had previously engaged in any self-injurious activities in Ms. Davis' presence.

37. C.P.'s activities when agitated had included rocking, jerking, rubbing his fingers together, and humming. These are all typical self-calming behaviors shown by individuals with autism. They were not unusual for a student with C.P.'s disability. The behaviors were to be expected and would not have triggered concerns sufficient to report the behavior.

38. In the past when C.P. became agitated, Ms. Davis had calmed him by offering cookies and speaking quietly to him.

39. On February 8, 2010, these techniques worked briefly. C.P. paused his head banging, but then resumed.

40. During Ms. Davis' ten years of employment, the School Board provided her 92 hours of job-related training, an average of 9.2 hours per year. Of that, 20 hours were her initial training. Ms. Davis attended the classes and successfully completed them. The instruction covered a wide range of topics including equipment, procedures for emergencies, such as traffic accidents, school board policies, and employee relations.

41. The training provided by the School Board included initial and refresher training in Crisis Prevention Intervention

(CPI). Ms. Davis' most recent CPI training was August, 2007. She successfully completed it. The CPI training is general and addressed a range of situations. It includes training in verbal and non-verbal techniques. The techniques range from soothing and calming to physical restraint.

42. There is no persuasive evidence that any of the CPI or other training specifically addressed the unique problems and dangers presented by a student in need of physical restraint in a moving vehicle.

43. The testimony of School Board witnesses who reviewed the video tape of the incident and the reports highlighted the difficulty of the situation. The School Board witnesses believed that C.P. was sitting in a window seat and said Ms. Davis should have relocated him. Other School Board witnesses, and common sense, more reasonably maintained that trying to relocate a physically agitated student in a moving bus would endanger him and the other passengers.

44. The CPI training did not include techniques specific to the unique issues presented by students with autism. It did not provide information about how to address head banging or suggest techniques such as cushioning the blows' impact when a person is banging his head against a hard object.

45. Typically, the school's training involved two days of in-service presentations about general issues, transportation,

student and personnel issues, including School Board policy, equipment, safety, and duties of bus drivers and aides. The training in aggregate provided little specific information about students with autism and nothing useful about ways to manage behavior such as that exhibited by C.P. on February 8, 2010.

46. The School Board provided Ms. Davis training in non-violent crisis intervention. It involved techniques for dealing with children who are acting out in an aggressive or violent manner. The training did not emphasize or focus on issues involving behavior of students with autism. It presented techniques as equally applicable and effective for all student populations, including ESE students with autism. The training, however, provided that employees should call their manager for assistance when faced with a problem they cannot handle.

47. Autism presents widely varied types of behavior. The crisis intervention techniques suggest engaging students in conversation and establishing a relationship with them through verbal interaction. This is not particularly useful or instructive in dealing with situations concerning non-verbal children.

48. One of the district's training documents is titled "How well do you KNOW YOUR EQUIPMENT ??????"

49. This training document is a representative sample of the training material that the district relies upon as having

prepared Ms. Davis for the student's head banging. The information it provided did not.

50. This is all the document had to say about possible behaviors of children with autism and how to react to them.

Child may not be able to voice his/her discomfort, this may be apparent by different types of behavior:

Rocking  
Banging with head or hands  
Biting  
Yelling, etc.

In retrospect things could be fine, and child may exhibit inappropriate language and behavior. Modification training may be required to minimize their actions and reactions, to a more acceptable behavior.

DON'T TAKE IT PERSONALLY

51. The information in other training materials is similarly non-specific and not helpful in the emergency Ms. Davis faced.

52. The CBA states: "[a]ny member of the Classified Unit may be dismissed by the School Board during his/her term of appointment, when a recommendation for dismissal is made by the Superintendent, for "just cause." The CBA defines "just cause" to include "insubordination; neglect of duty; unsatisfactory work performance; and violation of School Board Policy and/or Rules . . .".

53. School Board Rule 6.301(3)(b), provides a non-inclusive list of infractions that support disciplinary action. They include: neglect of duty; violation of any rule, policy, or regulation; sleeping during working hours; violation of safety rules; violation of the Code of Ethics of the Education

Profession; violation of the Principles of Professional Conduct for the Education Profession; violation of the Standards of Competent and Professional Performance; and violation of the Code of Ethics for Public Officers and employees.

54. The Code of Ethics of the Education Profession in Florida (Florida Administrative Code Rule 6B-1.001), and the Principles of Professional Conduct for the Education Profession in Florida (Florida Administrative Code Rule 6B-1.006) require Ms. Davis to have concern for the students as her primary professional concern; to seek to exercise the best professional judgment and integrity; and to make reasonable efforts to protect students from harmful conditions.

#### CONCLUSIONS OF LAW

55. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2011).

56. The School Board advances four factual bases for termination, all occurring on February 8, 2010. They are: Ms. Davis' handling of C.P.'s head banging; sitting in the front of the bus; not getting off the bus to greet each student and escorting the students to their seats; and sleeping on duty. The School Board maintains that violation of any one or more of the applicable School Board Rules or sections of the Code of Ethics, are good cause to terminate Ms. Davis. The clear focus

of the School Board's termination decision, however, is the handling of C.P.'s head banging.

57. The School Board bears the burden of proving the allegations of its petition for termination of employment by a preponderance of the evidence. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996).

58. Ms. Davis is an "educational support employee" as defined by section 1012.40(1)(a), Florida Statutes. She may be terminated for "just cause" as defined in the CBA. §1012.40(2)(c), Fla. Stat.

59. "Just cause" for discipline is a reason which is rationally and logically related to an employee's conduct in the performance of the employee's job duties and "imputes removal or termination for misconduct, some violation of the law, or derelict of duty on the part of the officer or employee affected." State ex rel. Hathaway v. Smith, 35 So. 2d 650, 651 (Fla. 1948).

60. A preponderance of the evidence established that on February 8, 2010, Ms. Davis did not perform the duty of getting off the bus to greet students and escorting them to their seats.

61. The School Board did not prove that by sitting at the front of the bus, Ms. Davis violated a governing rule or policy. The persuasive evidence proved that although the School Board had a rule requiring the paraprofessional to sit in the back of



the bus, the Transportation Director had approved a seating chart that plainly showed Ms. Davis sitting at the front of the bus. Therefore Ms. Davis' presence at the front of the bus was approved by the School Board.

62. The School Board did not establish that Ms. Davis was sleeping on the job. But, a preponderance of the evidence proved that Ms. Davis did not maintain the constant supervision of the students as required by her job.

63. Ms. Davis' handling of C.P. is the focus of the School Board's decision to terminate. One solution advocated by several School Board witnesses with the benefit of hindsight, time, and not being subject to the urgency of the moment, was moving C.P. That solution illustrates how difficult the situation was. The solution is also problematic. It would likely have endangered C.P. further, as well as the other bus passengers. It was also uninformed, since the witnesses thought that C.P. was sitting beside the window.

64. Another solution School Board witnesses propose, again with the benefit of hindsight, time, and no pressure, was that Ms. Davis should have removed her sweatshirt and used it as a cushion between C.P.'s head and the window. The sweatshirt would have provided minimal cushioning, and that sort of action was not covered in the training provided.

65. Notably the school was aware of the risk of head banging with C.P. and had planned for it in his educational plan. It did not have a plan for dealing with head banging on the bus and did not warn Ms. Davis or the driver of the possibility. A plan could have included providing a meaningful cushion to use if C.P. started head banging and advance preparation for such an incident.

66. The third solution advocated by the School Board witnesses was physical and verbal soothing. Ms. Davis initially tried to sooth C.P., giving him cookies and speaking to him. It ceased working. She was then faced with a choice between approaching him and possibly triggering more violent and self-destructive behavior or doing nothing, which permitted the head banging to continue and perhaps wind down, as it did. The persuasive evidence does not establish that one choice would have been better than the other.

67. But Ms. Davis ignored one choice, one that she was taught about in her training--call for assistance.

68. The facts of this case leave the question for resolution in this proceeding to be this: Does Ms. Davis' failure to perform her duty to greet and escort the children, failure to constantly monitor the students, and failure to call for assistance, in light of her satisfactory ten-year history of employment constitute "just cause" for terminating her?

Ms. Davis failed to perform her assigned duties. On February 8, 2010, Ms. Davis neglected her duties in violation of School Board Rule 6.301(3)(b)xii., she violated School Board Rule 6.301(3)(b)xii., by violating established procedures, and she failed to exercise her best professional judgment in violation of rule 6B-1.001(2).

69. The School Board relies heavily upon Lee County School Board v. Hall, Case No. 08-5409 (Fla. DOAH June 29, 2009), adopted by Final Order, School Board of Lee County Case No. 09-0005 (Lee C'nty Schl. Bd. Sept. 22, 2009). The facts of that case differ greatly from the facts here. Lee County School Board v. Hall, involved a bus driver who did not follow the School Board's specific written protocol for handling fights on the school bus. In that case, the School Board had provided specific training for handling fights. The School Board had also informed the driver of the student's history of fighting. Also, the bus driver in Lee County School Board v. Hall had a history of other disciplinary actions. Ms. Davis does not.

70. Lee County School Board v. Hall is instructive only in that it illustrates the significance of protocols and training for handling incidents. Here, the School Board did not provide specific training for handling self-injurious behavior by students with autism and did not provide Ms. Davis information

it had about C.P. that would have helped her prepare for the events of February 8, 2010.

71. The School Board also relies upon School Board of Sarasota County v. Shrader, Case No. 89-006946 (Fla. DOAH June 6, 1990; Fla. Sch. Bd. of Sarasota Sept. 23, 1990). Like Ms. Davis, Shrader was a bus aide on a bus transporting ESE students. There the similarity between the cases ends. Shrader yelled at a student and kicked at him. She was also yelling and screaming at the other children on the bus. Also when removing the child from the bus she held his elbow from behind, a technique that was not consistent with her training.

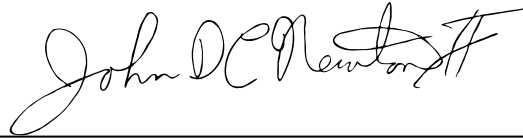
72. The facts here do not rise to the level of the facts in the preceding cases that supported termination. Ms. Davis faced an emergency for which she had not been well trained. The circumstances including the inability to stop the bus and the nature of autism created a situation with no clearly correct choices, except the choice to call for help.

73. Ms. Davis' failures to perform her job duties do not amount to "just cause" for termination. They do amount, however, to "just cause" for a one-year suspension.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered pursuant to section 435.06, suspending Respondent, Patricia Davis, from employment for a period of one year, starting November 9, 2010.

DONE AND ENTERED this 1st day of November, 2011, in  
Tallahassee, Leon County, Florida.



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JOHN D. C. NEWTON, II  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of November, 2011.

ENDNOTES

<sup>1/</sup> All citations to the Florida Statutes are to the 2010 edition  
unless otherwise noted.

<sup>2/</sup> This Order refers to the student by initials to provide  
confidentiality.

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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.