

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 11-2592TTS  
 )  
 LOUIS DEPRIEST, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

A final hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes, before Administrative Law Judge Cathy M. Sellers of the Division of Administrative Hearings on September 15, 2011. The hearing was held by video teleconference at sites in Miami and Tallahassee.

APPEARANCES

For Petitioner: Tedra Joy Gadson, Esquire  
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For Respondent: Mark Herdman, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether Respondent violated specified Miami-Dade County School Board rules, giving Petitioner just cause to suspend Respondent for five work days without pay.

PRELIMINARY STATEMENT

On May 11, 2011, Miami-Dade County School Board ("Petitioner") took action to suspend Louis DePriest ("Respondent") for five school days without pay for alleged violation of School Board Rules 6Gx13-4A-1.21 ("Responsibilities and Duties") and 6Gx13-4A-1.213 ("Code of Ethics").

Respondent timely requested an administrative hearing pursuant to sections 120.569 and 120.57(1), and this matter was referred to the Division of Administrative Hearings ("Division"). Petitioner's Notice of Specific Charges was filed on August 10, 2011. The parties filed a Joint Prehearing Stipulation on September 7, 2011.

The final hearing was conducted on September 15, 2011. At the hearing, Petitioner presented the testimony of Milagros Hernandez, Michael Tandlich, A.S., and J.C. Petitioner offered Exhibits 1 through 9 for admission into evidence. Petitioner's Exhibits 1 through 4 and 6 through 9 were admitted without objection; Petitioner's Exhibit 5 was admitted over objection. Respondent presented the testimony of Dr. Angela Thomas Dupree

and J.G., and testified on his own behalf. Respondent did not offer any exhibits for admission into evidence.

The one-volume Transcript was filed with the Division on October 24, 2011. The parties' Proposed Recommended Orders were filed on November 3, 2011, and were considered in preparing this Recommended Order.

## FINDINGS OF FACT

### I. The Parties

1. Petitioner is a school board charged with the duty to operate, control, and supervise all free public schools within the school district of Miami-Dade County, pursuant to article IX, section 4(b) of the Florida Constitution, and section 1012.23, Florida Statutes.<sup>1/</sup>

2. Respondent is a 27-year teacher employed by the Miami-Dade County Public Schools ("M-DCPS"). For the first 24 years of his career, Respondent taught adult vocational classes. For the past three years, Respondent has taught at Miami Lakes Educational Center ("Miami Lakes"). He is a television production teacher, teaching students entry-level television production skills to prepare them for careers in the television industry.

### II. Background of this Proceeding

3. At all times material, Respondent's employment was governed by the collective bargaining agreement between M-DCPS

and the United Teachers of Dade, Petitioner's rules and policies, and Florida law.

4. This matter had its genesis in late 2010, when two or three female students complained to Miami Lakes Assistant Principal Michael Tandlich that they felt uncomfortable in Respondent's classroom, specifically because Respondent touched them.

5. In response to the complaints, Mr. Tandlich took written statements from approximately ten students in Respondent's class.<sup>2/</sup> He took the statements to the Miami Lakes principal. As a result, the school initiated an investigation of Respondent's actions regarding the students in his class.

6. Once the investigation was complete, the matter was referred to Petitioner's Office of Professional Standards ("OPS") for a comprehensive review of all information related to the matter.

7. On March 1, 2011, Milagros Hernandez, District Director for OPS, sent Respondent a letter stating that as a result of the investigation, "[t]he initial investigative findings indicate that Probable Cause has been established for the allegation of violation of School Board Rule 6Gx13-4.109, Employee Student Relationships. Probable cause is defined as '[b]ased upon an evaluation of the evidence, it is more likely than not the alleged act occurred.'"

8. On March 8, 2011, OPS conducted a Conference-for-the-Record ("CFR"). Respondent and Ms. Hernandez were among the attendees. The CFR is a fact-finding conference held to discuss the incident and to afford the subject of the investigation the opportunity to tell his or her side of the story.

9. Following the CFR, OPS sent a letter to Respondent, dated May 4, 2011, advising him that OPS recommended that he "be suspended without pay for 5 workdays for violation of School Board Rules 6Gx13-4A-1.21, Responsibilities and Duties, and 6Gx13-4A-1.213, Code of Ethics . . . ."

10. On May 11, 2011, Petitioner suspended Respondent for five work days without pay for alleged violation of the above-stated rules.<sup>3/</sup>

### III. Incidents Giving Rise to Alleged Violations

11. A.S. is a female student in Respondent's television production class. She is in her junior year of high school at Miami Lakes. A.S. testified that Respondent touched her on the shoulders on more than one occasion, the touching made her feel uncomfortable, and she told him to stop. On one occasion when Respondent touched her on the shoulders, A.S. yelled at Respondent, "Stop touching me, you pedophile!" or something to that effect. She testified that Respondent did not touch her on any part of her body other than her shoulders, and has stopped touching her.

12. Testimony was elicited from A.S. and another student, J.G., establishing that A.S. is overly-dramatic, blows things out of proportion, and acts out in class in order to be the center of attention. The evidence also established that A.S. may have some animus toward Respondent because he is much stricter and has set much higher academic and behavioral standards than did his predecessor, and does not tolerate A.S.'s disruptive behavior in class.

13. J.C. is a female student in Respondent's class, and is A.S.'s friend. She is in her junior year of high school at Miami Lakes. J.C. testified that Respondent sometimes touched her on the shoulders, and that once, Respondent touched her dress at about mid-thigh level. The touching made her uncomfortable, but she never asked him to stop. Respondent did not touch her on any other part of her body. She acknowledged that Respondent's conduct likely was meant as complimentary and encouraging.

14. J.C. testified that Respondent had made the class much more demanding than had his predecessor, and that her classmates and friends had discussed their unhappiness with the change. She acknowledged that around that time, some students went to the assistant principal and complained that Respondent was touching students and making them feel uncomfortable.

15. J.G. is a male student in Respondent's class. J.G. testified that Respondent is a very strict teacher and that his class is very demanding "in a good way." J.G. testified that Respondent is very respectful of his students and encourages them during class, verbally and by patting them on the back or touching them on the shoulders. He treats male and female students the same in that regard. J.G. has never seen Respondent touch any of his students, male or female, in an inappropriate manner. J.G. stated that Respondent is a very professional teacher.

16. Respondent also presented the testimony of Dr. Angela Thomas Dupree, Vice Principal at Lindsay Hopkins Technical Education Center. Before assuming her current position, Dr. Dupree served at Miami Lakes for 12 years as an assistant principal and a vice principal. For approximately ten of her 12 years at Miami Lakes, she worked with Respondent as his direct supervisor and observed Respondent interacting with his students. She testified that he was very knowledgeable and always engaged in the classroom, and that he treated students with respect and dignity. She never observed, and was not aware of, any instances in which Respondent did not honor the integrity and retain the respect of his students. During her time in working with Respondent, he always conducted himself in a manner that reflected credit on him and on the school system.

17. Respondent testified on his own behalf. Respondent's goal in teaching the television production class is to prepare his students to enter the workforce in the television production industry. His classes are structured according to the grade level of the students in the class. For his higher level classes (i.e., junior and senior classes), students are given assignments for the day, then move into different areas to work on their specific assignments. Respondent supervises the students by walking back and forth between the work areas to make sure everyone is on task. One studio is very small, so it is not unusual for Respondent to walk up behind students when they are working and to touch them as he is showing them how to perform a task or use the computer. Respondent also encourages his students, verbally, by patting them on the back or touching their shoulders, and by giving them "high five."

18. Respondent testified that in one of his college communication courses, there was discussion about the importance of "breaking the shield" that each person has, in order to enhance interpersonal communication. Respondent noted that is often why people shake hands. Respondent testified that he tries to "break the shield" with his students, in part by touching them, in order to more effectively communicate with them. Touching always has been a part of the way Respondent teaches and conducts his class, until this incident.



19. Respondent testified that he did touch A.S. on her shoulders. On the day on which A.S. called Respondent a "pedophile," A.S. had been doing her homework for another class while in Respondent's class, and Respondent had asked her to stop. She ignored Respondent's request. Respondent was lecturing and walking around the studio, and the students' chairs and desks were arranged in the middle of the studio. As Respondent was walking around the studio, he observed A.S. continuing to do her homework despite being asked to stop. He walked up behind her and put his hands on her shoulders to get her to stop. A.S. jumped up and yelled at him. Respondent testified that he touched A.S. on her shoulders, and, on another occasion, may have touched her hair, but that he did not touch her on any other part of her body.

20. Respondent recalled touching J.C.'s dress. On the day in question, the students were wearing professional clothing, rather than their usual uniforms, as part of a "dressing for success" program being conducted at the school. Respondent was sitting down and J.C. was standing next to him. He touched the skirt of her dress and complimented her on her appearance. Respondent testified that he only meant to compliment her, and that she did not appear to be uncomfortable.

21. Respondent testified that he never has inappropriately touched students, and that when he has touched students, it has

never been with intent to do anything wrong. He acknowledged that he understands the difference between touching adult students and minor students while encouraging them in their class work.

22. Assistant Principal Michael Tandlich testified that Petitioner's policy is to prohibit the touching of students in any way; however, Mr. Tandlich was unable to identify any such policy or provision in Petitioner's rules. He also testified that he and the teachers at Miami Lakes routinely touch students—which he acknowledged would constitute widespread violation of such a policy, if one existed. Finally, he testified that he considers touching of students other than a handshake to be inappropriate—contradicting his previous testimony that there is an absolute prohibition on touching students.

23. Mr. Tandlich testified that teachers are informed, in the first meeting with school administration personnel at the beginning of the school year, regarding Petitioner's policies. However, Respondent credibly testified that he never was told that all touching of students is prohibited.<sup>4/</sup>

#### IV. Rules 6Gx13-4A-1.21 and 6Gx13-4A-1.213

24. Petitioner's rule 6Gx13-4A-1.21, "Responsibilities and Duties," provides in pertinent part:

I. Employee Conduct

All persons employed by The School Board of Miami-Dade County, Florida are representatives of the Miami-Dade County Public Schools. As such, they are expected to conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.

Unseemly conduct or the use of abusive or profane language in the workplace is expressly prohibited.

25. Petitioner's rule 6Gx-4A-1.213, "Code of Ethics," provides in pertinent part:

I. INTRODUCTION

As stated in the Code of Ethics of the Education Profession in Florida (State Board of Education Rule 6B-1.001):

\* \* \*

2. The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

3. Aware of the importance of maintaining the respect and confidence of one's colleagues, students, parents, and other members of the community, the educator strives to achieve and maintain the highest degree of ethical conduct.

\* \* \*

III. FUNDAMENTAL PRINCIPLES

The fundamental principles upon which this Code of Ethics is predicated are as follows:

\* \* \*

- Cooperation – Working together toward goals as basic as human survival in an increasingly interdependent world.
- Kindness – Being sympathetic, helpful, compassionate, benevolent, agreeable, and gentle toward people and other living things
- Pursuant of Excellence – Doing your best with the talents you have, striving toward a goal, and not giving up.
- Respect – Showing regard for the worth and dignity of someone or something, being courteous and polite, and judging all people on their merits. It takes three major forms: respect for oneself, respect for other people, and respect for all forms of life and the environment.

\* \* \*

Each employee agrees and pledges:

1. To abide by this Code of Ethics, making the well-being of the students and the honest performance of professional duties core guiding principles.
2. To obey local, state and national laws, codes and regulations.
3. To support the principles of due process to protect the civil and human rights of all individuals.
4. To treat all persons with respect and strive to be fair in all matters.
5. To take responsibility and be accountable for his or her actions.
6. To avoid conflicts of interest or any appearance of impropriety.
7. To cooperate with others to protect and advance the District and its students.

8. To be efficient and effective in the delivery of job duties.

\* \* \*

V. CONDUCT REGARDING STUDENTS

As set forth in the Principles of Professional Conduct for the Education Profession in Florida, each employee:

1. Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental or physical health and/or safety.
2. Shall not unreasonably restrain a student from independent action in pursuit of learning.
3. Shall not unreasonably deny a student access to diverse points of view.
4. Shall not intentionally suppress or distort subject matter relevant to a student's academic program.
5. Shall not intentionally expose a student to unnecessary embarrassment or disparagement.
6. Shall not intentionally violate or deny a student's legal rights.
7. Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.
8. Shall not exploit a relationship with a student for personal gain or advantage.

9. Shall keep in confidence personally identifiable information obtained in the course of professional service, unless disclosure serves professional purposes or is required by law.

V. Findings of Ultimate Fact

26. The plain language of these rules does not absolutely prohibit touching students, and the evidence does not establish the existence of an implicit prohibition in the rules. Mr. Tandlich's testimony was Petitioner's sole evidence of a "no touching" policy; however, that testimony was inconsistent and unpersuasive. Petitioner failed to establish that it has a policy absolutely prohibiting the touching of students. Accordingly, the question is whether, under the circumstances, Respondent's touching of students violated the standards expressly stated in rule 6Gx13-4A-1.21 or 6Gx13-4A-1.213.

A. Rule 6Gx13-4A-1.21, Responsibilities and Duties

27. There is no allegation or evidence in the record that Respondent used profane or abusive language. Therefore, the question whether Respondent violated this rule turns on whether his conduct was "unseemly." The rule does not define the term "unseemly conduct." However, case law has interpreted this term as meaning inappropriateness manifesting indecency, bad taste, or poor form. Miami-Dade County Sch. Bd. v. DePalo, Case No. 03-3242 (Fla. DOAH May 20, 2004; Miami-Dade Cnty. Sch. Bd.

July 15, 2004). The evidence does not establish that Respondent's conduct was "unseemly."

28. With respect to A.S., on the day she called Respondent a "pedophile," he had touched her shoulders in an effort to make her stop doing something that he specifically had told her not to do. Respondent's touching of A.S.'s shoulders was justified under these circumstances.<sup>5/</sup>

29. With respect to J.C., Respondent touched her dress in connection with paying her a compliment on a day when the students were dressed to present a professional appearance. Respondent's touching was meant to encourage and compliment J.C., and, in fact, she acknowledged this.

30. To the extent Respondent may have touched A.S. and J.C. on other occasions, he did not touch them in a manner different from the way he touches any other student. The competent evidence in the record shows that when Respondent touched students, he did so in a manner that specifically was intended to encourage or compliment them, or instruct them in the performance of their class work.

31. Under these circumstances, Respondent's conduct was not inappropriate, indecent, or in poor taste, and, therefore was not "unseemly."<sup>6/</sup> Accordingly, Petitioner did not establish, by a preponderance of the evidence, that Respondent violated rule 6Gx13-4A-1.21.

B. Rule 6Gx13-4A-1.213, Code of Ethics

32. The evidence also establishes that Respondent abided by, and did not violate, the applicable provisions of rule 6Gx13-1.213, the Code of Ethics.

33. With respect to the applicable "Fundamental Principles" rule provisions, as discussed above, the evidence shows that Respondent makes the well-being of his students and the honest performance of his professional duties his core guiding principles; that he treats his students fairly and with respect; and that he is, and strives to be, a very effective teacher. The evidence does not show that Respondent's effectiveness in the school system has been impaired by this incident.

34. With respect to the "Conduct Regarding Students" rule provisions, Petitioner did not present any credible, persuasive evidence establishing that Respondent failed to make reasonable effort to protect students from conditions harmful to learning and/or to the student's mental and/or physical health, or that he is an ineffective teacher. To the contrary, the evidence shows that Respondent is an engaged, effective teacher, who sets high standards for his students, expects those standards to be met, and does not countenance disruptive behavior.

35. There is no credible or persuasive evidence establishing that Respondent intentionally exposed students to



unnecessary embarrassment or disparagement. The evidence establishes that Respondent's touching always was intended to encourage, compliment, and instruct students, and to enhance communication with them as part of being an engaged and effective teacher.

36. There was no credible, persuasive evidence presented establishing the Respondent violated any other provisions of rule 6Gx13-4A-1.213.

37. Based on the competent substantial evidence in the record, the undersigned finds, as a matter of ultimate fact, that Respondent did not violate Petitioner's rule 6Gx13-4A-1.21 or 6Gx13-4A-1.213.<sup>7/</sup>

#### CONCLUSIONS OF LAW

38. The Division has jurisdiction over the parties and subject matter of this proceeding, pursuant to sections 120.569 and 120.57(1).

39. This is a penal disciplinary proceeding brought pursuant to section 1012.33, Florida Statutes, and Florida Administrative Code Rules 6B-4.009, 6B-1.001, and 6B-1.006, to uphold Respondent's suspension from employment for five days without pay, for alleged violations of Petitioner's rules 6Gx13-4A-1.21 and 6Gx13-4A-1.213. Petitioner bears the burden to prove each element of each charged offense by a preponderance of the evidence. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So.

2d 476 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Lake Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

40. Any member of the instructional staff in a district school system may be suspended or dismissed at any time during the term of his or her employment contract for just cause, as provided in section 1012.33(1)(a). § 1012.33(6)(a), Fla. Stat.

41. "Just cause" is defined to include misconduct in office.<sup>8/</sup> § 1012.33(1)(a), Fla. Stat. "Misconduct in office" is defined as "a violation of . . . Rule 6B-1.001, F.A.C., and . . . Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system." Fla. Admin. Code R. 6B-4.009(3).

42. Rules 6B-1.001<sup>9/</sup> and 6B-1.006(3)<sup>10/</sup> have been incorporated into Petitioner's rule 6Gx13-4A-1.21. Therefore, for Petitioner to establish "just cause" as defined in section 1012.33, to suspend Respondent from his employment, Petitioner must demonstrate, by a preponderance of the evidence, that Respondent violated these rules.

43. It is well-established that whether a particular action constitutes a deviation from a standard of conduct established by rule or statute is a question of fact to be decided by the trier of fact, considering the testimony and evidence in the context of the alleged violation. Langston v.

Jamerson, 653 So. 2d 489 (Fla. 1st DCA 1995); Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1st DCA 1985). See also McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); MacMillan v. Nassau Cnty. Sch. Bd., 629 So. 2d 226 (Fla. 1st DCA 1993). Accordingly, whether Respondent's conduct violated Petitioner's rules is a factual, not legal, determination.<sup>11/</sup>

44. As discussed above, Petitioner did not establish, by a preponderance of the evidence, that Respondent violated Petitioner's rules 6Gx13-4A-1.21 and 6Gx13-4A-1.213.

45. Accordingly, Petitioner did not establish, by a preponderance of the evidence in the record, that just cause exists under section 1012.33 and rules 6B-4.009, 6B-1.001, and 6B-1.006, to suspend Respondent from his employment for five days without pay.

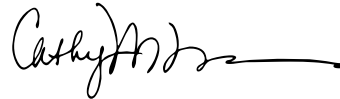
46. Therefore, Petitioner should enter a Final Order rescinding the suspension of Respondent from his employment for five days without pay and paying Respondent his back salary, pursuant to section 1012.33, for the five-day period for which he was suspended.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board enter a Final Order rescinding the suspension of Respondent from his employment for five days without pay, and paying

Respondent's back salary for the five-day period for which he was suspended.

DONE AND ENTERED this 28th day of November 2011, in Tallahassee, Leon County, Florida.



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CATHY M. SELLERS  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
This 28th day of November, 2011.

ENDNOTES

<sup>1/</sup> Unless otherwise noted, all references are to 2010 Florida Statutes.

<sup>2/</sup> Mr. Tandlich testified that he took written statements from a cross-section of the students in Respondent's class based on gender and race.

<sup>3/</sup> Respondent served his suspension between May 12, 2011, and May 18, 2011.

<sup>4/</sup> Petitioner's Exhibit 4, Respondent's signed certification that he received a copy of Petitioner's Code of Ethics, was offered to show Respondent received notice, at the beginning of the 2010-2011 school year, of a "no touching policy." However, that exhibit is dated August 2011—after the incidents that precipitated this matter occurred. Accordingly, Exhibit 4 is

not probative to whether Respondent received notice of a "no touching policy—to the extent one were to exist in Petitioner's Code of Ethics—during the timeframe relevant to this proceeding.

<sup>5/</sup> The persuasiveness of A.S.'s testimony is diminished in light of credible, persuasive testimony establishing that she may have held animus toward Respondent for his lack of tolerance for her disruptive classroom behavior.

<sup>6/</sup> Rule 6Gx13-4A-1.21 also states that employees are expected to conduct themselves in a manner that will reflect credit on themselves and the school system. To the extent this provision constitutes a regulatory standard rather than an aspirational goal, the evidence does not support a finding that Respondent engaged in conduct that does not reflect credit on himself and the school system.

<sup>7/</sup> Whether a particular action constitutes a deviation from a standard of conduct established by rule or statute is a factual question to be decided by the trier of fact, considering the testimony and evidence in the context of the alleged violation. Langston v. Jamerson, 653 So. 2d 489 (Fla. 1st DCA 1995).

<sup>8/</sup> "Just cause" also includes immorality, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, a entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude. § 1012.33(1)(a), Fla. Stat. These terms are defined in rule 6B-4.009. Petitioner did not specifically identify which of these it asserts constitutes "just cause" for Respondent's suspension, but the only one that appears applicable under the circumstances is "misconduct in office."

<sup>9/</sup> This rule is incorporated into rule 6Gx13-4A-1.21, section III., Fundamental Principles.

<sup>10/</sup> This rule is incorporated into rule 6Gx13-4A-1.21, section V., Conduct Regarding Students.

<sup>11/</sup> Because whether an action deviated from a standard of conduct established by statute or rule is an issue of ultimate fact, case law holding that the construction of a regulation by the agency charged with its enforcement and interpretation is entitled to great deference does not control in this case. Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA

1995) (rejecting the agency's argument that it was not bound by the hearing officer's findings regarding alleged violations of education profession rules because such determinations were matters of law, not fact). Moreover, even if such case law were pertinent to this case, Petitioner's interpretation of its rules as establishing an absolute prohibition on all touching of students is unreasonable and clearly erroneous as unsupported by the plain language of the rules. Under these circumstances, Petitioner's interpretation is not entitled to deference. See id. at 490-91.

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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.