SCHOOL BOARD OF OSCEOLA COUNTY, FLORIDA

OSCEOLA COUNTY SCHOOL BOARD,

Petitioner,

v. **School Board of Osceola County Case. No.**

LILLIAN GOMEZ, **DOAH Case No. 12-0544TTS**

Respondent.

_____/

FINAL ORDER

Pursuant to notice and in conformance with the requirements of Florida's Administrative Procedures Act, the School Board of Osceola County considered in open session the Recommended Order in this case issued by Administrative Law Judge Lynne A. Quimby-Pennock dated August 17, 2012. This consideration of the Recommended Order was for the purpose of rendering a Final Order in accordance with the requirements of Section 1012.33, Florida Statutes and 120.57, Florida Statutes. And, the School Board of Osceola County, after being fully advised in the premises, does hereupon order and adjudge as follows:

1. The School Board adopts in total, without any addition, substitution or modification each and every finding of fact made by the Administrative Law Judge in her Recommended Order dated August 17, 2012.

2. The findings of fact made by the Administrative Law Judge in her Recommended Order are incorporated herein by reference in full.

3. The School Board does, however, reject the conclusion of law made by the Administrative Law Judge that the School Board failed to prove substantial impairment of effectiveness in the employment. Specifically, at paragraph 23 of the Recommended Order the Administrative Law Judge stated and found: "There was no credible evidence introduced that Ms. Gomez's effectiveness as a teacher in the school system was impaired."

4. At paragraph 31 of the Recommended Order, the Administrative Law Judge correctly refers to the definition of "misconduct in office" contained in the Florida Administrative Code. The

term is defined by the Administrative Law Judge, "as a violation of the Code of Ethics of the Education Profession or the Principles of Professional Conduct for the Education Profession in Florida, which is so serious as to impair the individual's effectiveness in the school system."

5. At paragraphs 32 and 33 of the Recommended Order, the Administrative Law Judge correctly cites to the Florida Administrative Code provisions that codify the Code of Ethics of the Education Profession and the Principles of Professional Conduct. At paragraph 33 the Administrative Law Judge correctly quotes the legal requirements imposed upon the teacher, including the teacher's obligation to her student that she "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."

6. The Administrative Law Judge, at paragraph 35 correctly cites *Dietz v. Lee Co. Sch. Bd.*, 647 So.2d 217, 218 (Fla. 2d DCA 1994), for the proposition that the School Board has discretion in defining what constitutes "just cause" for disciplinary action against employees, including suspension or termination.

7. In *Purvis v. Marion Co. Sch. Bd.*, 766 So.2d 492, 498 (Fla. 5th DCA 2000), the appellate court with jurisdiction over Osceola County found that even if there is no evidence on the issue of impairment of effectiveness, that impairment of effectiveness may be inferred simply from the nature of the violation. Thus, the court stated:

> "This court, however, has indicated that impaired effectiveness in the school system can be inferred from certain misconduct. *Summers v. School Bd.*, 666 So.2d 175 (Fla. 5th DCA 1995). The *Summers* opinion does not specify the particular misconduct involved, but does say that there had been no finding that a teacher's conduct was 'so serious as to impair the individual's effectiveness in the school system' nor was any evidence on this issue presented at the teacher's hearing – that is, no one testified that appellant's conduct impaired his effectiveness. *Summers* argued that these two omissions required reversal of the order of suspension. This court disagreed, holding that the teacher's impaired effectiveness could be inferred from the nature of the violation."

8. As recognized by the Fifth District Court of Appeal in *Purvis*, in the decision in *Walker v. Highlands Co. Sch. Bd.*, 752 So.2d 127 (Fla. 2d DCA 2000), the appellate court found that

evidence of impaired effectiveness is unnecessary because the misconduct in that case "spoke for itself." The court in *Walker* distinguished its earlier decision in *McNeil v. Pinellas Co. Sch. Bd.*, 678 So.2d 476 (Fla. 2d DCA 1996), in which it had suggested that an Administrative Law Judge's finding of no evidence of impairment of effectiveness is always a finding of fact, by pointing out that in *McNeil* the misconduct was of a "private immoral nature." *Purvis v. Marion Co. Sch. Bd.*, 766 So.2d at 498.

9. The court in *Purvis* found that a court should ordinarily defer to an agency such as a school board when it rejects or modifies an Administrative Law Judge's conclusion of law or interpretation of an administrative rule over which the agency or school board has substantive jurisdiction. *Id.*, at 498-499. The court recognized that Section 120.57, Florida Statutes allows for the agency to reject or modify conclusions of law and interpretations of administrative rules over which the agency has substantive jurisdiction.

10. Section 120.57 (1)(l), Florida Statutes, provides in part that the School Board may reject or modify the Administrative Law Judge's conclusions of law and interpretations of administrative rules over which the School Board has substantive jurisdiction. The School Board hereby finds that it has substantive jurisdiction to interpret and apply the rules of the Florida Department of Education found in the Florida Administrative Code which define misconduct in office, as well as the rules that codify the Code of Ethics of the Education Profession and the Principles of Professional Conduct for the Education Profession. Moreover, the School Board has substantive jurisdiction with respect to the relevant provisions in Chapter 1012, Florida Statutes, which govern the professional conduct of educators and grant the School Board the authority to to discipline or terminate teachers who violate professional standards.

11. As allowed by the appellate court in *Purvis v. Marion County, supra*, the School Board of Osceola County hereby rejects the finding made by the Administrative Law Judge that Ms. Gomez's effectiveness as a teacher in the school system was unimpaired. To the contrary, based solely on the findings of fact and other conclusions reached by the Administrative Law Judge, the

School Board finds that the effectiveness of Ms. Gomez as a teacher in the Osceola County School District was seriously impaired as a result of her misconduct and inappropriate behavior.

12. The following findings of fact made by the Administrative Law Judge in her Recommended Order are particularly relevant to the School Board's conclusion that the effectiveness was substantially and materially impaired:

a. Paragraph 10 of the Recommended Order: J.A. is a nonverbal student with autism. At the time he was in Ms. Gomez's classroom (2011-12) he was 5 years of age. J.A. functioned at a lower level than the other students in the classroom and was known to eat inedible objects "such as … crayons prior to entering Ms. Gomez's classroom."

b. Paragraph 12 of the Recommended Order: Although the IEP does not specifically identify J.A.'s "propensity to place inedible objects in his mouth" it was well known by virtue of his Occupational Therapy Assessment (date of test: April 25, 2011) and [his] Psychoeducational Reevaluation Report (evaluation date: March 31, 2011] ... that [the student] "seems to need to have something in his mouth" and "puts inedible things in his mouth." [The reports available in the District records] also contain some "stereotyped behaviors" that J.A.'s father reported to the psychologist. It was recorded that J.A. would frequently "lick, taste or attempt to eat inedible objects." The School Board personnel were aware of J.A.'s propensity to eat inedible objects …"

c. Recommended Order paragraph 14: "The School Board utilizes positive behavior support for all students. The School Board does not have a document that contains an approved aversive therapy policy and procedure …"

d. Recommended Order paragraph 15: The Administrative Law Judge finds that shortly after the 2011-12 school year began, the paraprofessionals and Respondent, Lillian Gomez "each noticed that J.A. put inedible objects in his mouth while in the classroom and on the playground."

e. Recommended Order paragraph 15: One of the paraprofessionals (Ms. Santana) "noticed that, when she turned to assist another student, J.A. would grab crayons and put them in his mouth. Although not done daily, J.A. would frequently grab a crayon and chew on it. Ms. Gomez ... would attempt to remove the crayons from J.A.'s mouth; however, when an autistic child clenches his mouth shut, there is little that can be done to open it."

f. Recommended Order paragraph 16:

> "Sometime in early October 2011, in an attempt to modify J.A.'s eating of inedible objects, Ms. Gomez peeled the paper wrapper off several jumbo size crayons and placed them in a disposable cup. She then poured Louisiana Hot Sauce over the crayons. Ms. Gomez allowed the cup of hot sauce crayons to sit. Then Ms. Gomez removed the hot sauce crayons, placed them on a towel, and allow them to dry. There was a strong odor to those hot sauce crayons. Ms. Gomez instructed Ms. Santana (one of the paraprofessionals) to put the hot sauce crayons in a plastic zip-lock baggie labeled with J.A.'s name and directions that other students were not to use those crayons. Ms. Santana complied with this request."

g. Recommended Order paragraph 17:

> "Although the baggie with the hot sauce crayons was placed on the table at the writing center for several days, neither Ms. Santana nor Ms. DeLuna ever saw Ms. Gomez put a hot sauce crayon in J.A.'s mouth. Ms. Santana saw J.A. pick up other non-hot sauce crayons and chew or mouth them while at the writing center during that time."

h. Recommended Order paragraph 18:

> "Play-doh was also used in the classroom; ... None of the classroom adults observed J.A. grabbing, mouthing, chewing or eating any Play-doh at any time. At approximately the same time as the hot sauce crayons were made, Ms. Gomez also massaged hot sauce into some black Play-doh. As directed, Ms. Santana place the hot sauce Play-doh in a

separate plastic zip-lock baggie labeled with J.A.'s name and directions that other students were not use that Play-doh."

i. As a result of the findings of fact in paragraphs 19 and 20 of the Recommended Order, the School Board finds that there was no evidence that the Respondent ever attempted to force any of the hot sauce materials into the student's mouth, nor was there any evidence that the student in fact ever placed any of the hot sauce materials in his mouth. Although evidence to the contrary was provided by Ms. Santana, the hearing officer made a credibility determination and did not find Ms. Santana's testimony in that regard credible. The School Board cannot and does not disturb that finding by the Administrative Law Judge and limits the findings of fact it has relied upon strictly to those findings of fact made by the Administrative Law Judge in this case. See also paragraph 22 in the Recommended Order.

j. Recommended Order paragraph 23:

"In this case, it is clear that placing hot sauce on crayons and Play-doh warrants some form of discipline. Although no noticeable harm came to the student or any [other] student, the mere creation of the material is contrary to School Board policy."

k. Recommended Order paragraph 37:

"The School Board proved by a preponderance of the evidence that [Respondent] Ms. Gomez placed hot sauce on crayons and Play-doh in an effort to modify the student's behavior and keep that student from eating crayons and Play-doh. Ms. Gomez did not exercise the best professional judgment or maintain her integrity when she mixed hot sauce with the crayons and/or Play-doh. For that she should be disciplined in some fashion."

13. Pursuant to statute, the School Board hereby states with particularity its reasons for rejecting this conclusion of law or interpretation of Administrative Rule. Such reasons for rejection are: The teacher intended to use hot sauce to discourage the child from placing crayons or Play-doh

in his mouth. The child is nonverbal and very young, and is therefore not an effective advocate for himself. It requires great care to ensure that students are protected from conditions that are unsafe or harmful as required by applicable ethical and professional standards. If the student had placed something very hot in his mouth, it is likely that he would have experienced some degree of discomfort, shock and upset. This is particularly true given the fact that autistic children are often hypersensitive. The program for educating autistic children often involves "brushing" and other tactile sensation techniques so that the student learns to tolerate touch and other impact on his psyche. Similarly, autistic students do not transition well or generalize from one environmental context to another, and having something hot inserted into his mouth by surprise would have likely resulted in significant physical and/or mental harm to the student. Moreover, the School Board has only a program for positive behavioral reinforcement, and aversive therapies are not allowed. Additionally, the School Board questions seriously the judgment of a teacher who would take it upon herself to implement this type of program in order to correct an autistic child's inappropriate behavior, without first bringing in one of the many behavioral analysts employed in the District who would conduct a functional behavior assessment to determine the functionality of the inappropriate behavior, and develop a behavior plan for reducing the frequency of the targeted inappropriate behavior through the use of appropriate means as selected by a licensed behavior specialist. These protocols are well known to any exceptional student education teacher such as the Respondent. The Respondent as well as all personnel of the District must be mindful of the need to avoid anything that could be viewed as an abuse of a child. See, e.g. Florida Statutes, Sections 39.201 and 39.205; School Board Rule 2.80.

The effectiveness of the teacher is substantially impaired because of the extraordinarily bad judgment of using an abusive, unauthorized and potentially criminally unlawful technique purportedly to remediate an inappropriate behavior of a 5-year-old autistic student. The fact that the teacher was not disciplining the student is irrelevant. You do not justify an inappropriate action by claiming the intended result was good. You do not open a container by destroying it with a hammer,

nor do you remediate inappropriate student behavior by a young autistic child through the use of corporal punishment or other unlawful and inappropriate means. (A parent could not justify child abuse on the grounds that it was intended to make the child behave – that same standard applies with even more force in the professional setting of Exceptional Student Education teachers who are responsible for the care and education of the most vulnerable of our students).

Additionally, the School District has received contact from parents, including from persons outside of the District, who are aware of the news reports concerning the Respondent's behavior and the results of the administrative hearing. There was notoriety concerning the Respondent's conduct, and the impairment of effectiveness is serious and includes the fact that persons in the community will be reluctant to trust their children to be in the care of the Respondent, particularly where the children are nonverbal or otherwise significantly disabled and therefore are more vulnerable and unable to report or resist abusive treatment. The notoriety of the Respondent's misconduct has tended to hold the education profession and the School District of Osceola County in disrepute, and the public interest will be harmed if the School Board places the teacher back into the classroom given such notoriety and the public's expectation that the School Board will effectively manage, control and operate its District schools and will provide for a safe educational environment.

14. Rulings on Petitioner's Exceptions to the Recommended Order:

a. The School Board declines to rule on the Exceptions pursuant to Section 120.57(1)(j), Florida Statutes. There is a failure to provide necessary, appropriate and specific citations to the record that show there was an absence of competent substantial evidence to support findings of fact or that demonstrate conclusively that conclusions of law were erroneous.

b. The Exceptions are rejected tot he extent the Petitioner is requesting the Board re-weigh the evidence. The Administrative Law Judge is permitted to weigh and test the credibility of witnesses. To the extent her rejection of certain testimony provided by Ms. Santana was based upon her finding that "Ms. Santana's testimony is undermined by her inability to describe other details surrounding the alleged

incident", the School Board must accept that determination. The Board did not observe the testimony, nor did it test the demeanor of the witnesses or consider how the witnesses appeared while testifying.

c. The Exceptions concerning the ALJ's finding there was no evidence of impaired effectiveness is ultimately a policy decision or conclusion to be determined by the agency. The School Board has found that based upon the record presented, it is unable to reject this conclusion as a matter within its discretion and determination of policy. The School Board does accept, however, the finding that the behavior by Respondent was inappropriate and warrants a suspension without pay through August 17, 2012.

15. As required by the statute, the School Board hereby certifies that it has reviewed the entire record, including the transcript and exhibits, and states with particularity in this Order that it has good reason to substitute its judgment for that of the Administrative Law Judge with respect to the question of whether or not the teacher's effectiveness as an educator in the District was impaired seriously or substantially. For the reasons stated in the immediately preceding paragraph, the School Board's interpretation of Administrative Rules and the law over which it has substantive responsibility and jurisdiction is significantly more reasonable than the interpretation made by the Administrative Law Judge on this single question. For the reasons stated in this paragraph and in the immediately preceding paragraph, the School Board should be sustained in its rejection of the finding and substitution of its conclusion that the teacher's effectiveness as an educator in the District has been seriously and substantially impaired. Additionally, the School Board should be sustained for these reasons in its imposition of a termination from employment in lieu of the recommended suspension without pay.

Wherefore, the School Board of Osceola County does hereby accept the findings of fact in total made by the Administrative Law Judge in her Recommended Order, rejects only her conclusion that effectiveness was not impaired, and as a result thereof, the School Board does hereby terminate the Respondent, Lillian Gomez from employment with the School Board of Osceola County.

Done and entered this 15th day of November, 2012 at the offices of the School Board of Osceola County Florida, 817 Bill Beck Blvd., Kissimmee, FL 34744.

Barbara R. Horn
Barbara Horn, Chairperson

Attested by:
Tonya M. Culver
Printed name: Tonya M. Culver
Title: Secretary

NOTICE OF RIGHTS OF APPEAL PURSUANT TO SECTION 120.68, FLORIDA STATUTES

Notice is hereby given that this is a final agency order and a party adversely affected may seek judicial review. Judicial review is sought pursuant to the provisions in Section 120.68 Florida Statutes. Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law. Appellate proceedings are instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed.

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