STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAKE COUNTY SCHOOL BOARD,
     Petitioner,
vs.
JACLYN OCKERMAN,
     Respondent.

Case No. 12-2270TTS

RECOMMENDED ORDER

This case was heard on September 10, 2012, in Leesburg, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stephen W. Johnson, Esquire
McLin & Burnsed, P.A.
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Leesburg, Florida 34749

For Respondent: Alfred Truesdale, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent violated Florida Administrative Code Rule 6B-1.006(3)(a) of the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida as alleged in Petitioner's June 6, 2012, notice of recommendation

of termination and, if so, the nature of the sanctions.

PRELIMINARY STATEMENT

On June 6, 2012, the Lake County School District Superintendent of Schools notified Respondent of the Superintendent's intent to recommend that the Lake County School Board (School Board) terminate Respondent's employment as a teacher at the Fruitland Park Elementary School. Prior to the proposed termination, Respondent taught a kindergarten-level class for students with Autism Spectrum Disorder.

The notice of recommendation of termination alleged that Respondent "slapped, squeezed faces, and pulled forcibly on the arms of the students" and created "a culture of silence . . . in your classroom which discouraged other staff from coming forward with the allegations." As such, Petitioner alleged that Respondent failed to "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."

Respondent timely filed a petition disputing allegations in the notice. The petition was referred by the School Board to the Division of Administrative Hearings on June 27, 2012. The matter was noticed for hearing on August 14, 2012. Respondent requested a continuance of the hearing, which was unopposed. The hearing was reset for September 10, 2012, and was held as scheduled.

At the final hearing, Petitioner presented the testimony of Rebecca Nelson, Petitioner's Supervisor of Compensation and Employee Relations; Lisa Bass, a paraprofessional teacher's assistant at Fruitland Park Elementary School; Lauren Atwood, a teacher for K-2 intellectually disabled students and former teacher's assistant in Respondent's classroom; Respondent, Jaclyn Ockerman; Dr. Melissa Dejarlais, the principal at Fruitland Park Elementary School; Patricia Nave, the assistant principal at Fruitland Park Elementary School; Gale Linson, Petitioner's Program Specialist for Autism Spectrum Disorder; and Anganette Rose, a Behavior Analyst on contract with Petitioner for the 2010-2011 school year. Petitioner offered Petitioner's Exhibits P1-P10, P10A, and P11-P14, which were received in evidence. Among Petitioner's exhibits were depositions of: Helen Johnson, a former teacher's assistant in Respondent's classroom (Exhibit P1); and Elizabeth Michelle Price, a former teacher's assistant in Respondent's classroom (Exhibit P2). Both Ms. Johnson and Ms. Price were greater than 100 miles from the location of the hearing, and their depositions were admitted in lieu of live testimony. Petitioner's exhibits also included Respondent's deposition (Exhibit P3).

Respondent testified on her own behalf and presented the testimony of Gary Johnson, a former teacher and Grade Level

Exceptional Student Education (ESE) Chair at Fruitland Park Elementary School; Michael Turner, a former ESE teacher at Eustis High School; and Jacqueline Dobbs, an ESE teacher at Fruitland Park Elementary School during the time in question. Respondent offered Respondent's Exhibits R1-R9, which were received in evidence.

A one-volume Transcript of the hearing was filed on September 26, 2012. Petitioner and Respondent timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order. References to statutes are to Florida Statutes (2011) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is the constitutional entity authorized to operate, control, and supervise the system of public schools in Lake County, Florida. Art. IX, § 4(b), Florida Constitution; § 1001.32, Fla. Stat. Petitioner has the authority to discipline instructional staff and other school employees. §1012.22(1)(f), Florida Statutes.

2. At all times relevant to this proceeding, Respondent was a teacher of K-3 students with Autism Spectrum Disorder (ASD). During the 2011-2012 school year, Respondent's class had between two and seven students.

3. Respondent holds a bachelor's degree in elementary education and a master's degree in special education.

Respondent received her Florida teaching certificate in 2008. Petitioner has completed the coursework for the autism endorsement, but has not yet added it to her teaching certificate. Petitioner also received annual Crisis Prevention Intervention (CPI) training, which is a nonviolent crisis intervention and restraint training. CPI teaches ways to restrain or calm an autistic child when the child is "coming at you physically."

4. Respondent started her teaching career in Lake County in December 2008 at Eustis High School, where she taught ninth grade ESE students. She taught at the Spring Creek charter elementary school for the 2009-2010 school year, where she taught a self-contained K-6 class of approximately fifteen students having various disabilities.

5. Respondent was hired at Fruitland Park Elementary School for the 2010-2011 school year, and was assigned to teach a K-3 level class for ASD students. Most of the students in Respondent's class were kindergarten-level students.

6. Respondent was retained at Fruitland Park Elementary School for the 2011-2012 academic school year pursuant to a professional services contract, entered on August 15, 2011, which provided that:

> The Teacher shall not be dismissed during the term of this contract except for just cause as provided in sections 1012.33,

> Florida Statutes, and such other provisions as prescribed by state law, School Board Policy, and the District's Instructional Personnel Evaluation System. "Just cause" includes, but is not limited to the following: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

7. Respondent received "acceptable" evaluations while at Fruitland Park Elementary School, which was the highest rating at the time. Respondent was the subject of no parent complaints.

8. Respondent was well regarded as a good and effective teacher, firm in discipline, and knowledgeable in her field.

9. Prior to the incidents that are the subject of this proceeding, Respondent was not subject to any disciplinary action.

10. Students with ASD have difficulty controlling their behavior, often act out in a physical manner, and are frequently non-verbal.

11. Respondent's classroom was located in a portable classroom building. Thus, if a student was outside of the classroom, he or she was physically outside, and not in an interior hallway of a larger building. The classroom backed up to the PE field.

12. Respondent was assigned one full-time and one part-time teacher's assistant (TA) to help with her ASD students.

13. Elizabeth Price was Respondent's full-time assistant for the 2010-2011 and 2011-2012 school years.

14. Ms. Price claimed that she was "verbally abused" by Respondent during the 2011-2012 school year as a result of an October 2011 discussion, initiated by Respondent and directed at Ms. Price's "negative attitude." Ms. Price was overtly critical of Respondent to others during the course of the school year, including the classroom behavior analyst, Ms. Rose. In addition to her testimony as to the criticism leveled at Respondent by Ms. Price, Ms. Rose testified as to her impression that Ms. Price wanted more independence to implement her own strategies, but that Respondent guided her "in staying with the protocols that she had in the classroom." Ms. Rose's testimony is not accepted to prove the truth of the matters asserted, but rather as evidence of Ms. Price's feelings of ill-treatment at the hands of Respondent. Ms. Price testified that she felt unable to complain to the administration because Respondent "had a personal relationship with our assistant principal" and that, if she complained, her job would be in jeopardy. The testimony of Ms. Price as a whole, and her written statement provided to the school on May 2, 2012, leaves the undersigned with the

distinct impression of a personal animus by Ms. Price against Respondent.

15. The part-time TAs varied throughout the year.

16. Sharon Rogers was assigned as a part-time TA to Respondent's classroom at the beginning of the 2011-2012 school year. She was only in the class for a few weeks.

17. Ms. Rogers was replaced by Lauren Atwood, who was in the class from September 27, 2011, to January 30, 2012, at which time she accepted a full-time position as a K-2 teacher for intellectually disabled students at Fruitland Park Elementary. Prior to being placed in Respondent's classroom, Ms. Atwood had never worked in a unit with autistic children. During the time Ms. Atwood was in Respondent's class, she never saw Respondent strike a student, never saw Respondent roughly handle a student, and never saw Respondent grab a student by an arm or leg.

18. Ms. Atwood was replaced by Helen Johnson. Ms. Johnson was the part-time TA at the time Respondent was removed from the classroom.

19. From November 2011 until late April, 2011, Lisa Bass was a TA in Jacqueline Dobbs' class for emotionally disturbed children. In late April 2012, Ms. Bass was assigned to replace Ms. Price as a TA in Respondent's class. Ms. Bass was asked by Candice Benjamin, the Fruitland Park ESE specialist, to report anything "untoward and unprofessional" that happened in

Respondent's classroom. Ms. Bass testified that Ms. Benjamin's request "was very cryptic" and that she felt as though she was acting "cloak and dagger." Ms. Bass served as a TA for approximately five days, and on May 2, 2012, reported the conduct that resulted in Respondent's removal from the classroom.

20. The TAs were typically with Respondent at all times, and assisted with the "centers" where the students did their work. Respondent was, as a rule, alone with the students for no more than 15 minutes per day, when one TA would go to lunch, and the other would go to pick up lunches for the students, who ate in the classroom.

21. During the times they were assigned to Respondent's classroom, none of the TAs held teaching certificates, and none were certified in any behavioral specialties.

22. In addition to the TAs, Respondent's class was visited on a regular basis by a speech therapist. The speech therapist missed Respondent's classroom visit at least once a month, and sometimes more, for reasons that varied. Since the absences often occurred on Wednesdays, Respondent tried to make alternative arrangements for a student who had her speech therapy on Wednesdays and who Respondent felt was being short-changed as a result. Respondent complained to the ESE specialist regarding the absences.

23. In late April, 2012, the school decided to rotate TAs to different classes. Respondent felt that practice disrupted her classroom, which in some measure depended on stability and familiarity of the teachers to the students. Respondent complained about the practice in late April 2012.

24. There were no complaints made against Respondent by her TAs or anyone else until Ms. Bass reported her complaint on May 2, 2012. No TAs complained until Ms. Dejarlais called them in for interviews.

25. Ms. Nave, the Fruitland Park Elementary School assistant principal, observed Respondent in the classroom "many times". She never observed Respondent engaging in any inappropriate behavior, including slapping, kicking, or grabbing of students.

26. Ms. Linson, the School Board ASD Program Specialist, occasionally observed Respondent in the classroom. She never observed inappropriate behavior in Respondent's classes.

27. The notice of recommendation of termination that forms the basis for this proceeding alleged that Respondent "slapped, squeezed faces, and pulled forcibly on the arms of the students" and created "a culture of silence . . . in your classroom which discouraged other staff from coming forward with the allegations."

Allegations of Slapping

28. Ms. Atwood testified that she saw Respondent slap one student's hands "a few times." The incidents occurred when a particular student took something that was not his, or tried to place his hands on or hurt another student. The slaps were not hard, and triggered no concern that the incidents should be reported. Other than slapping hands, Ms. Atwood knew of no other incidents of Respondent striking a student.

29. Ms. Johnson testified that she observed Respondent slap a student's hand on one occasion. The incident occurred after the student struck Respondent on the back. Ms. Johnson testified that Respondent slapped the student's hand and said "don't hit." The incident left no mark on the student's hand. Ms. Johnson did not contemporaneously report the incident.

30. Ms. Johnson also testified that Respondent slapped a student's hand when he pinched her nipple. Ms. Johnson understood the slap to be a reflexive reaction to the pain. The undersigned does not consider a mild human response to a personal and painful event to constitute a violation of the disciplinary standards at issue in this case.

31. Other than the single incident of slapping the student's hand in response to being struck on the back, Ms. Johnson never observed Respondent roughly physically handling any student.

32. Ms. Price testified that, on one occasion during the 2011-2012 school year, Respondent slapped a student on the arm while engaged in a "tug of war" over a bin where the student sat. She stated that the slap was, in her opinion, harder than necessary. The slap left no mark on the student's arm. Ms. Price could not recall when the alleged incident occurred, being unable to narrow it even to a six month window. Ms. Price did not contemporaneously report the incident.

33. Respondent testified that she never struck a student. Respondent testified that she occasionally had to deflect student attempts to strike her, but that physical contact was done as an avoidance technique or when a student was perceived to be a threat to others.

34. ASD teachers are taught to fend off attempts by students to strike the teacher or others by the use of blocking techniques in which the kicks and hits are deflected. The impression conveyed to the undersigned was one of a "wax on-wax off" motion. The attempts are physically blocked, and the target moved. Respondent testified that her attempts to deflect and redirect blows by pushing away a student's hand could be conceived as a slap.

35. Respondent testified that she is hit and kicked by her students almost as a matter of course. Her testimony was supported by that of Ms. Linson, who noted that ASD students

frequently hit teachers, and Ms. Rose, who commented that Respondent turned her back to the students when they struck her, and as a result "often got hit in the back." Respondent generally ignored the frequent incidents.

36. The evidence as to the slapping of students' hands was contradictory. The analysis of the evidence was made more difficult by the fact that Respondent had specialized training in dealing with ASD students and the TAs had none, and by the fact that blocking techniques could be misconstrued as slapping by those unfamiliar with the intervention. The evidence indicates that at least some of the small handful of incidents were taken to prevent a student from harming other students.

37. Nevertheless, Petitioner proved, by a bare preponderance of the evidence, that Respondent slapped the hands of one or more students in something more than a purely defensive or protective manner on, at most, a very few occasions, including the incident described by Ms. Johnson in which Respondent slapped the hand of a student after having been hit on the back. The evidence demonstrates such incidents were isolated and mild. There was no evidence introduced to support a finding that the incidents were harmful to any student's learning, or that the incidents adversely affected any student's mental or physical health, or their safety.

Allegations of Squeezing Student's Faces

38. Two days after she was placed in Respondent's classroom, Ms. Bass testified that she observed Respondent grab a child's face. The incident purportedly occurred when a student was running with a toy. Respondent wanted the student to settle down, which he would not do. The student fell and began to cry. Ms. Bass testified that Respondent grabbed the student's face and said, in a voice between calm and yelling, something to the effect of "I am in charge. You're not in charge here. You will do as I say." Ms. Bass stated that "[i]t appeared from my perspective she was squeezing his cheeks." The incident left no marks on the student's face. Ms. Bass reported the incident to Ms. Dejarlais and Ms. Nave.

39. Respondent generally denied the description of the event provided by Ms. Bass, and specifically denied ever having squeezed a student's cheeks. Respondent testified that she would occasionally hold a student's face in her hands, and direct the student's eyes to hers while speaking. In directing eye contact, she exerted no pressure on the student's cheeks or face. That intervention technique was done to gain the attention of the student and remove what may have been distracting them. Based on her education and experience, Respondent understood that technique to be an acceptable way to

direct eye contact. Her testimony was more credible than that of Ms. Bass.

40. Ms. Rose agreed that it is an acceptable research-based intervention to orient a student's face, deliver instruction, and then provide reinforcement. In implementing that "shadowboxing technique," it is appropriate to use physical guidance, i.e. holding the student's face, to get eye contact. That approach is "in the scaffolding of prompting, physical prompting," and is not outside the scope of what the research indicates is effective.

41. Ms. Rose testified that with younger children it is often more appropriate to start with the most prompting and fade to the least prompting, an intervention described as "errorless learning." Using that model, physical prompting as a first resort is an effective method and it is supported by the research.

42. Based on the foregoing, Petitioner has failed to prove by a preponderance of the evidence that Respondent squeezed students' faces as alleged in the notice of recommendation of termination.

Allegations of Pulling Forcibly on the Arms of the Students

43. Ms. Price provided the only evidence that Respondent pulled forcibly on the arm of any student. The alleged incident occurred after a student had eloped from the classroom. The

student was sitting, cross-legged, on the landing outside the portable classroom. The landing is not gated or otherwise secured, and there is nothing to prevent one from walking from the landing to the PE field or beyond.

44. Ms. Price testified that Respondent got her body in the doorway, grabbed the student by the arm, and pulled him back into classroom "more forcefully than necessary." Ms. Price characterized the event as aggressive in nature. When asked whether Respondent tried other methods to get the student to return to the classroom, Ms. Price testified that "I'm sure that she did. She typically did," but that "I don't recall. I was doing something else." Ms. Price's lack of direct attention to the incident leads the undersigned to question her account.

45. Respondent testified that she never pulled a child in from outside through door. In cases of elopement, she would usually try to hold the student by the hand or wrist to guide them back in, but never jerked or pulled on the arm of any student. Her testimony was more credible than that of Ms. Price, and is accepted.

46. Ms. Linson testified that in cases of elopement, it is appropriate to take a student by the hand or wrist to guide them back inside. She stressed that "we have to be careful around wrists and arms" to avoid concerns with dislocation of the

shoulder, but gave no suggestion that guiding by the wrist was inappropriate.

47. Ms. Linson also testified that if a student is trying to run away, it is appropriate to apply the "children's control position" as taught as part of the CPI. In that intervention, an adult, with his or her arms crossed and elbows locked, would hold the student on the adult's side. The intervention is appropriate only for small children, but is an approved restraint. Ms. Linson recognized that human reflex can occasionally result in the restraint being imperfectly, but still appropriately, administered.

48. Ms. Atwood testified that Respondent occasionally had to move a student to time-out when the student had engaged in behavior warranting discipline. She testified that Respondent generally just guided the student, but that when the student would not go willingly, she might put her arms through the student's arms and move the student to time-out. Ms. Atwood took the required annual CPI course offered to teachers and TAs, but that even with that one-day training, she was not sure how to handle autistic students, and did not know whether the method used by Respondent to move recalcitrant students to time-out was correct or not. In any event, the method described by Ms. Atwood does not meet the allegation that Respondent "pulled forcibly on the arms of the students."

49. Respondent testified that she occasionally had to physically move a student if he was injuring himself or others, and it was not possible to get others away. In such an instance, Respondent and a TA would implement an approved intervention to move the student to time out, but in no instance would she or anyone else in her classroom pick a student up by the arm, or otherwise pull a student by the arm.

50. Based on the foregoing, Petitioner has failed to prove by a preponderance of the evidence that Respondent "pulled forcibly on the arms of the students" as alleged in the notice of recommendation of termination.

Allegation of Creating a Culture of Silence

51. The allegation that Respondent created a culture of silence was based on a statement, frequently repeated at various places, that "what happens in Vegas, stays in Vegas" or "what happens in the classroom stays in the classroom." The allegation suggested that Respondent made the statement with the intent to discourage the TAs or others from reporting abusive conduct.

52. Ms. Atwood testified that she never heard the "Vegas" statement, but that in any event she was not intimidated by Respondent, and was never discouraged from reporting inappropriate activities.

53. Ms. Nave overheard the "Vegas" conversation at the bus loop in the fall of 2011. The TAs and Respondent were laughing about it, and she perceived nothing of importance or significance about the statement. She understood it to apply to "some silly things that were happening in the classroom."

54. Ms. Johnson testified that she heard the "Vegas" statement, but was confused about it, and did not know what it meant. Ms. Johnson offered no testimony to support a finding that Respondent intended the statement to discourage her from reporting abusive conduct.

55. Ms. Price offered the only suggestion that the "Vegas" statement was intended to discourage reporting unprofessional or inappropriate activities in the classroom. Ms. Price testified that she "took it" to mean that Respondent was telling her not to bring any complaints against her. She did not testify that Respondent made any direct statement to that effect, but based her testimony on her own subjective belief.

56. Ms. Price did not mention Respondent having discouraged the reporting of inappropriate conduct by means of the "Vegas" statement or otherwise in her May 2, 2012, written witness statement. Rather, she only raised it when her supervisors at the school district told her to think about it.

57. Ms. Price's testimony and written statement that Respondent intended the oft-repeated "Vegas" statement to be an

effort to mask abuse in the classroom, taken as a whole and in conjunction with her general degree of antipathy towards Respondent as described above, is not credible.

58. Respondent and others testified convincingly that the concept of "what happens in Vegas, stays in Vegas" was intended to allow the teachers and TAs to discuss personal matters, and even gossip about other school employees, without fear of their comments being spread around. Respondent testified that the statement was not intended to act as a shield for unprofessional or abusive conduct occurring in the classroom. Respondent's testimony is accepted.

59. Based on the foregoing, Petitioner has failed to prove by a preponderance of the evidence that Respondent created "a culture of silence . . . in your classroom which discouraged other staff from coming forward with the allegations" as alleged in the notice of recommendation of termination.

Unpled Issues

60. Ms. Atwood, Ms. Johnson, and Ms. Price each alluded to a degree of "yelling" in Respondent's class that was greater than they believed should occur in a "normal" class. In her written statement, Ms. Atwood stated that "at times [it] seemed to be a little too much." Ms. Johnson felt that it "was, to me, over the top." However, no TA saw fit to report Respondent's yelling at any time prior to May 2, 2012.

61. No one described what was meant by "yelling" except in the most general and subjective way. No witness testified as to any standard or criteria regarding "yelling" in an ASD class setting. No evidence was elicited as to whether "yelling" might be appropriate at times. Respondent admitted that she raised her voice on occasion to get the students' attention when the classroom was loud or to make a point, but gave no suggestion that it was contrary to any standard. Although Ms. Linson testified that "yelling" is not appropriate in any class, she did not define "yelling," nor does she have an autism endorsement to her teaching certificate that might provide additional weight to her testimony as applied to the unique challenges of an ASD class.

62. Despite the volume of the evidence and testimony regarding "yelling," the fact is that it was not pled as a basis for Respondent's termination. Had it been pled, the Petitioner failed to prove, by a preponderance of the evidence, that the "yelling" violated any standard warranting discipline against Respondent.

63. During the course of the proceeding, references were made to Respondent having moved the furniture from her classroom. The evidence was conflicting as to whether the removal of the furniture was known or authorized by the school administration. However, it appears that there was a sound,

safety-based reason for removing the furniture and gradually reintroducing it to the classroom.

64. Despite the discussion regarding the removal of furniture from the classroom, that issue was not pled as a basis for Respondent's termination. Had it been pled, the Petitioner failed to prove, by a preponderance of the evidence, that the removal of the furniture violated any standard warranting discipline against Respondent.

Discipline

65. Petitioner has adopted, as policy section 6.361 of the School Board of Lake County, an Employee Discipline Plan. The plan provides that "[w]hen discipline of any employee becomes necessary, such action should be in proportion to the employee's offense or misconduct . . . ."

66. The Employee Discipline Plan includes a Progressive Discipline Method by which sanctions are scaled based on the severity of the occurrence, and on whether it has recurred. The purpose of the policy is to let employees know the nature of the violation and provide an opportunity to correct the behavior.

67. The Progressive Discipline Method includes five steps: Counseling, Level I Reprimand, Level II Reprimand, Suspension and Termination. The Method provides that:

> Because of the severity in the loss of one's job employees should be terminated only

> after thorough investigation. The investigation should conclude that:
>
> 1. The employee did, in fact, commit the act;
>
> 2. Evidence of guilt is available;
>
> 3. The employee's entire work record, positive and negative, has been considered;
>
> 4. The same rules are applied uniformly to other employees; and
>
> 5. The penalty of dismissal is reasonably related to the seriousness of the offense.

68. The Employee Discipline Plan provides that:

> The Superintendent is not required to use this Progressive Discipline Method and may administer discipline at any level, including termination, based on the nature of the offense and the particular circumstances. Examples of actions resulting in immediate suspension or dismissal include, but are not limited to, the following: immorality, gross insubordination, willful neglect of duty, incompetence, substance abuse including alcohol, being convicted or found guilty of or pleading guilty to (regardless of adjudication of guilt) any crime involving moral turpitude.

69. Respondent did not commit any of the specified offenses that constitute "examples of actions resulting in immediate suspension or dismissal."

70. The School District did not exercise the Progressive Discipline Method, but proceeded directly to termination of Respondent.

71. Ms. Dejarlais did not know why the progressive disciplinary policy was not followed in Respondent's case. The school officials elected to have the investigation done at the county level, rather than at the school level. It was not explained why such an investigative procedure was undertaken, or whether it was a deviation from the normal disciplinary practice of the school.

72. Since most of the allegations against Respondent were not proven, including those that would normally be understood to be the most serious, there is no reasonable basis to disregard Petitioner's adopted Employee Discipline Plan and Progressive Discipline Method.

73. Petitioner failed to prove, by a preponderance of the evidence, that Respondent committed the acts alleged, with the exception of a few instances in which she slapped students' hands. The slaps, which were themselves mild, may have been misconstrued defensive blocking techniques. In any event, the instances were isolated, and formed no pattern of unprofessional or inappropriate conduct.

74. Petitioner failed to demonstrate that it considered Respondent's entire work record, positive and negative, during the investigation.

75. Petitioner failed to demonstrate that it applied the same rules that led to Respondent's termination to other

employees. However, since most of the allegations against Respondent were disproven, any analysis of the violations -- as charged -- would be of limited value. As to the issue of slapping hands, the only evidence in the record as to the sanction for that type of incident was the testimony of Ms. Linson, who was not aware of any instance in which a teacher was terminated for slapping the hand of a student.

76. Petitioner failed to demonstrate that the sanction of termination was reasonably related to the seriousness of the offense, especially given that most of the allegations upon which the decision to terminate was based were not proven. Given the isolated nature of the hand slaps, the mild nature of the slaps, and the possibility that the slaps were misperceived blocking techniques, the undersigned finds that the sanction of termination was not reasonably related to the seriousness of the offense.

77. The evidence demonstrates that, upon her removal from the classroom, Respondent was assigned to the school Copy Center at full pay and benefits pending the outcome of this proceeding.

CONCLUSIONS OF LAW

A. Jurisdiction.

78. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of

the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).

B. Standards

79. A district school board is considered a public employer with respect to all employees of the school district. § 447.203(2), Fla. Stat. As such, a school board has the right to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or other legitimate reasons. § 447.209, Fla. Stat.

80. Section 1012.22(1), Florida Statutes, provides, in part, that a district school board shall "[d]esignate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees . . . , subject to the requirements of [chapter 1012]."

81. Respondent is an employee of Petitioner pursuant to a Professional Service Contract of Employment entered under the authority of section 1012.33.

82. Subsection 1012.33(1)(a), Florida Statutes, provides that a teacher's contract "shall contain provisions for dismissal during the term of the contract for just cause," which includes misconduct in office as defined by rule of the State Board of Education.

83. Florida Administrative Code Rule 6A-5.056 establishes the criteria for suspension and dismissal of school personnel. Subsection (2) of the rule provides that:

> "Misconduct in Office" means one or more of the following:
>
> (a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6B-1.001, F.A.C.;
>
> (b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C.;
>
> (c) A violation of the adopted school board rules;
>
> (d) Behavior that disrupts the student's learning environment; or
>
> (e) Behavior that reduces the teacher's ability or his or her colleague's ability to effectively perform duties.

84. Rule 6B-1.006 Principles of Professional Conduct for the Education Profession in Florida, provides, in pertinent part, that:

> (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.

85. Petitioner's Policy 6.301 requires Petitioner's employees to "adhere to the Code of Ethics of the Education Profession in Florida."

C. The Burden and Standard of Proof.

86. Petitioner seeks to terminate Respondent's employment, which does not involve the loss of a license or certification. Thus, Petitioner has the burden of proving the allegations in its Administrative Complaint by a preponderance of the evidence. Cropsey v. Sch. Bd. of Manatee Cnty., 19 So. 3d 351, 355 (Fla. 2d DCA 2009); Cisneros v. Sch. Bd. of Dade Cnty., 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008); 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 Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

87. The preponderance of the evidence standard "is defined as 'the greater weight of the evidence,' Black's Law Dictionary 1201 (7th ed. 1999), or evidence that 'more likely than not' tends to prove a certain proposition." Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000). See also Haines v. Dep't of Child. & Fams., 983 So. 2d 602, 606 (Fla. 5th DCA 2008).

88. The allegations of fact set forth in the charging document are the facts upon which this proceeding is predicated. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005). See also Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). In this case, the Administrative Complaint alleged that Respondent "slapped, squeezed faces and pulled forcibly on the arms of the students" and created "a culture of silence . . . in your classroom which discouraged other staff from coming forward with the allegations." Thus, the scope of this proceeding is properly restricted to those matters as framed by Petitioner. M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

89. Petitioner failed to prove, by a preponderance of the evidence, that Respondent squeezed the face of any student, pulled forcibly on the arms of any student, or created a culture of silence that discouraged staff from reporting incidents of abuse or other improper conduct.

90. Petitioner proved, by a preponderance of the evidence, that Respondent slapped the hands of one or more students over the course of the 2011-2012 school year on, at most, a few occasions. The incidents occurred when a student took something that was not his, tried to place his hands on or hurt another student, or struck Respondent. The incidents were isolated and mild, and could have been defensive techniques that were

misperceived by the observer. There was no evidence that the incidents were harmful to any student's learning, adversely affected any student's mental or physical health, or compromised any student's safety.

91. The evidence produced at the hearing demonstrates that Petitioner did not have just cause to terminate the employment of Respondent for misconduct in office.

92. The facts and circumstances of this case, considered in their totality, warrant the imposition of a penalty commensurate with the severity of the offense proven, and consistent with Petitioner's Employee Discipline Plan and Progressive Discipline Method, adopted as Policy 6.361. The recommendation that follows is made taking into account all of the facts and circumstances established in this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Lake County School Board, enter a final order:

(a) dismissing those allegations in the notice of recommendation of termination that Respondent squeezed faces, pulled forcibly on the arms of the students, and created a culture of silence which discouraged other staff from coming forward with allegations of misconduct;

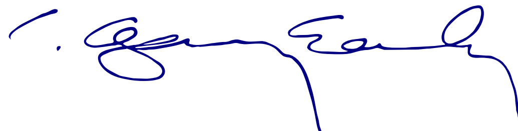
(b) finding that Respondent slapped the hands of students, but that such incidents were isolated, mild, and may have been a misperception of an otherwise acceptable defensive blocking technique;

(c) reinstating Respondent to a position equivalent to that previously held with the Lake County School District;

(d) imposing the Step I sanction of counseling as set forth in Petitioner's Progressive Discipline Method; and

(e) to the extent Respondent lost wages or benefits, award full back pay and benefits from the time she was removed from the classroom in May 2012, until the date of her reinstatement.

DONE AND ENTERED this 14th day of November, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of November, 2012.

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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.