STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 12-3278TTS

AMY FINNK,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge Todd P. Resavage for final hearing by video teleconference on March 26, 2013, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

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For Respondent: Robert F. McKee, Esquire
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STATEMENT OF THE ISSUE

Whether just cause exists to suspend Respondent's employment with the Broward County School Board, for five days for misconduct in office and immorality, as alleged in the Administrative Complaint.

PRELIMINARY STATEMENT

On September 23, 2012, the Broward County Superintendent of Schools issued an Administrative Complaint recommending that the Broward County School Board ("Board") suspend Respondent, Amy Finnk, for five days.

Respondent timely requested a formal administrative hearing to contest the allegations, and, on October 9, 2012, Petitioner referred the matter to the Division of Administrative Hearings ("DOAH"), where it was assigned to Administrative Law Judge John G. Van Laningham. Petitioner filed its Administrative Complaint wherein it alleged that just cause exists to suspend Respondent's employment based upon Respondent's publishing, disclosing, and/or filing confidential student information and/or student records of a minor student in violation of 20 U.S.C. § 1232g; sections 1002.20, 1002.22, 1012.33 and 1012.33, Florida Statutes; Florida Administrative Code Rules 6B-1.001, 6B-1.006, 6B-4.009, and 6A-1.0955; and Board Policy 5100.1.

The final hearing initially was set for January 17, 2013. On January 4, 2013, this case was transferred to the undersigned for all further proceedings. On January 9, 2013, Petitioner filed an Emergency Motion to Reset Hearing. Petitioner's motion was granted and the cause was re-scheduled for final hearing on March 26, 2013.

The final hearing was held on March 26, 2013. Both parties were represented by counsel. Petitioner presented the testimony of David Golt, Donald Cottrell, and Cassandra Sirmons, and Petitioner's Exhibits 1, 3, 4, 8, 13-14, and 16 were admitted. Respondent testified on her own behalf.

The final hearing Transcript was filed on May 3, 2013. The parties timely filed proposed recommended orders, which were considered in preparing this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged violation.

FINDINGS OF FACT

1. Petitioner is the entity charged with the duty to operate, control, and supervise the public schools within Broward County, Florida.

2. At all times pertinent to this case, Respondent was employed as a behavioral specialist teacher at the Sunset School ("Sunset"), a public school in Broward County.

3. Sunset is an educational center servicing emotionally and behaviorally disabled students ranging in ages from 5 to 22, kindergarten through twelfth grades. The program at Sunset is unique in its behavior management system and mental health component which include academic, vocational, therapeutic, and behavioral interventions.

4. On December 5, 2011, Respondent notified Principal Cottrell that she intended to seek a restraining order against Sunset student, A.W. In the dialogue that followed, Principal Cottrell requested that, when completed, Respondent provide him a copy of the court documents.[1/]

5. On that same date, Respondent presented to the Clerk of the Court for the Circuit Court of Broward County, Florida, with the intention of filing a Petition for Injunction for Protection Against Repeat Violence ("Petition") against A.W.

6. Respondent, who was not represented by counsel, obtained the blank Petition from a clerk, and filled in the required information by hand. Upon completion, Respondent presented the Petition back to the clerk. The clerk then inquired as to whether Respondent had any additional documentation that she wished to attach to the Petition.

7. It is undisputed that Respondent then attached four documents to the Petition. Specifically, Respondent attached 1) a Sunset School Code Report dated December 5, 2011, detailing a behavioral issue concerning A.W.; 2) a Sunset School Incident report dated December 5, 2011, again detailing a behavioral issue concerning A.W.; 3) a Sunset School Incident report dated November 1, 2011, documenting a behavioral issue concerning A.W.; and 4) a Student Accident/Illness Form dated November 1,

2011, documenting a physical confrontation by and between A.W. and Respondent.

8. The Circuit Court issued a temporary injunction against A.W. precluding A.W. from knowingly coming within 100 feet of Respondent's vehicle and ordering the parties to refrain from contact while at Sunset. The parties were notified to appear and testify at a hearing regarding the matter on December 14, 2011.

9. Respondent, as requested, provided Principal Cottrell with a copy of the Petition; however, the attachments were not included in the copied material.

10. After being served with the temporary injunction, A.W.'s mother notified Principal Cottrell and complained, inter alia, that A.W.'s records had been attached to the same.

11. In response to the parent complaint, on or about December 8, 2011, Principal Cottrell submitted a personnel investigation request to the School Board of Broward County Office of Professional Standards and Special Investigative Unit ("SIU"). The investigation request alleged that Respondent had committed Family Educational Rights and Privacy Act ("FERPA") and Code of Ethics violations.

12. On or about December 14, 2011, the Board filed a Notice of Special Appearance and Motion to Seal Confidential Records in the underlying case. The judge granted the unopposed

motion, concluding the records were confidential pursuant to section 1002.221(2)(a), Florida Statutes and "FERPA regulations," and ordered the records sealed.

13. The previously requested SIU investigation was initiated on or about January 9, 2012. Upon completion, the matter was referred to the Professional Standards Committee ("PSC"). The PSC found probable cause that Respondent had committed misconduct in violating Board Policy 5100.1, and recommended she serve a suspension.

14. Thereafter, the Superintendent of Schools reviewed the recommendation of the PSC, concurred, and recommended a five-day suspension. Finally, the Broward County School Board approved the recommended suspension.

15. The documents Respondent attached to the Petition were A.W.'s educational records. Said records included personally identifiable information of A.W. obtained in the course of professional service.

16. The parties stipulate that Respondent did not have the authorization or consent of A.W., A.W.'s parents, or Sunset to attach A.W.'s educational records to the Petition.

17. Prior to the 2011-2012 school year, Respondent attended a preplanning conference wherein the teaching staff was advised of current information related to the Health Insurance Portability and Accountability Act (HIPPA), FERPA, federal and

state law, and Board policies. Respondent also acknowledged receipt of the 2011-2012 Staff Handbook and the Code of Ethics. Moreover, Respondent signed an Employee Confidentiality Agreement regarding HIPPA. Additionally, the Board policy concerning student record confidentiality is published, maintained, and available to the teaching staff.

18. Respondent conceded, as she must, that she was aware of the obligations as a behavioral specialist at Sunset to maintain the confidentiality of student educational and health records. Notwithstanding, Respondent credibly testified that, at the time, she believed the confidentiality requirements of said records would be maintained in the court proceeding.

19. Principal Cottrell opined that Respondent's conduct impaired her effectiveness. His testimony on this point is set forth in full, as follows:

> Q. Does the fact that these records were disclosed by Ms. Finnk impair her effectiveness to you – her effectiveness as a teacher to you within the system?
>
> A. Within her capacity at Sunset School or in any capacity at Sunset School when I am the administrator responsible, absolutely. I need to know that each and every team member at Sunset, each and every employee is responsible and knowledgeable on confidentiality and follows it without question.

20. The undersigned finds that the above-quoted testimony is insufficient to support a finding that Respondent's conduct impaired her effectiveness in the school system.

CONCLUSIONS OF LAW

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

22. Petitioner seeks to uphold Respondent's suspension from employment for five days. In order to do so, Petitioner must prove by a preponderance of the evidence that Respondent committed the violations as alleged in the Administrative Complaint. 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).

23. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

24. 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.

25. The term "just cause":

> [I]ncludes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea to, regardless of adjudication of guilty, any crime involving moral turpitude.

§ 1012.33(1)(a), Fla. Stat.

26. In its Administrative Complaint, Petitioner avers alternative grounds for suspending Respondent: "misconduct in office" (Count A) and "immorality" (Count B). Whether Respondent is guilty of these charges, both of which are discussed separately below, is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

27. As noted above, Petitioner contends that Respondent has committed "misconduct in office," which is defined by the State Board of Education as a:

> [V]iolation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in 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).[2/]

28. "As shown by a careful reading of rule 6B-4.009, the offense of misconduct in office consists of three elements: (1) A serious violation of a specific rule that (2) causes (3) an impairment of the employee's effectiveness in the school system." Miami-Dade Cnty. Sch. Bd. v. Regueira, Case No. 06-4752, 2007 Fla. Div. Adm. Hear. LEXIS 208 (Fla. DOAH Apr. 11, 2007). As further explanation, rule 6B-4.009:

> [P]lainly requires that a violation of both the Ethics Code and the Principles of Professional Education be shown, not merely a violation of one or the other. The precepts set forth in the Ethics Code, however, are so general and so obviously aspirational as to be of little practical use in defining normative behavior. It is one thing to say, for example, that teachers must "strive for professional growth." See Fla. Admin. Code R. 6B-1.001(2). It is quite another to define the behavior which constitutes such striving in a way that puts teachers on notice concerning what conduct is forbidden. The Principles of Professional Conduct accomplish the latter goal, enumerating specific "dos" and "don'ts." Thus, it is concluded that that while any violation of one of the Principles would also be a violation of the Code of Ethics, the converse is not true. Put another way, in order to punish a teacher for misconduct in office, it is necessary but not sufficient that a violation of a broad ideal articulated in the Ethics Code be proved, whereas it is both necessary and sufficient that a violation of a specific rule in the Principles of Professional Conduct be proved.

Id.

29. Petitioner contends that Respondent's "distribution of the student information without the knowledge, authorization or consent of either the student, the student's parents or administrators" resulted in the following violations of the Principles of Professional Conduct:

> 6B-1.006 Principles of Professional Conduct for the Education Profession in Florida.
>
> * * *
>
> (3) Obligation to the student requires that the individual:
>
> * * *
>
> (e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.
>
> (f) Shall not intentionally violate or deny a student's legal rights.
>
> * * *
>
> (i) Shall keep in confidence personally identifiable information contained in the course of professional service, unless disclosure serves professional purposes or is required by law.
>
> (4) Obligation to the public requires that the individual:
>
> * * *
>
> (c) Shall not use institutional privileges for personal gain or privilege.

30. Of the four rule violations alleged in the Administrative Complaint, only one has merit.[3/] Petitioner

correctly contends and has met its burden of proof that Respondent violated rule 6B-1.006(3)(i).

31. Section 1002.20 sets forth certain parental rights concerning their children's educational records, as follows:

> (13) STUDENT RECORDS
>
> (a) *Parent's rights.*—Parents have rights regarding the student records of their children, including right of access, right of waiver of access, right to challenge and hearing, and right of privacy, in accordance with the provisions of s. 1002.22.

§ 1002.20(13)(a).

32. Section 1002.22, in turn provides, in pertinent part:

> (2) RIGHTS OF STUDENTS AND PARENTS.—The rights of students and their parents with respect to education records created, maintained, or used by public educational institutions and agencies shall be protected in accordance with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. s. 1232g, the implementing regulations issued pursuant thereto, and this section. In order to maintain the eligibility of public educational institutions and agencies to receive federal funds and participate in federal programs, the State Board of Education shall comply with the FERPA after the board has evaluated and determined that the FERPA is consistent with the following principles:
>
> * * *
>
> (d) Students and their parents shall have the right to privacy with respect to such records and reports.

§ 1002.22(2)(d).

33. Under FERPA, schools and educational agencies receiving federal financial assistance must comply with certain conditions. 20 U.S.C. § 1232g(a)(3). One condition specified in FERPA is that sensitive information about students may not be released without parental consent. FERPA states that federal funds are to be withheld from school districts that have "a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents." § 1232g(b)(1).

34. The term "personally identifiable information" is defined by 34 C.F.R. § 99.3 as follows:

> The term includes, but is not limited to—
>
> (a) The student's name;
>
> (b) The name of the student's parent or other family members;
>
> (c) The address of the student or student's family;
>
> (d) A personal identifier, such as the student's social security number, student number, or biometric record;
>
> (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
>
> (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the

relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

35. Board policy 5100.1 similarly provides, in relevant part:

STUDENT RECORDS: CONFIDENTIALITY AND FAMILY EDUCATIONAL RIGHTS

STUDENT RECORDS ARE OFFICIAL AND CONFIDENTIAL DOCUMENTS PROTECTED BY FLORIDA STATUTE 1002.22 AND THE FEDERAL FAMILY RIGHTS AND PRIVACY ACT (FERPA). FERPA, ALSO KNOWN AS THE BUCKLEY AMENDMENT, DEFINES EDUCATIONAL RECORDS AS ALL RECORDS THAT SCHOOLS OR EDUCATIONAL AGENCIES MAINTAIN ABOUT STUDENTS.

* * *

RULES:

I. DEFINITIONS:

* * *

D. **Personally identifiable information** includes, but is not limited to, a student's name, parents' names, street address or email address of the student or student's family, personal identifier such as a social security number or student number, photographs, and a list of personal characteristics or other information that would make the student's identity easily traceable.

36. Respondent, without parental consent, attached educational records of A.W. to the Petition that unequivocally include personally identifiable information, as that term is defined above, and, therefore, violated rule 6B-1.006(3)(i).

37. Next, it must be determined whether Respondent's violation of the foregoing Principle of Professional Conduct was so serious as to impair her effectiveness in the school system. The School Board failed to make such a showing. Aside from Principle Cottrell's laudable and aspirational expectation that, "each and every employee is responsible and knowledgeable on confidentiality and follows it without question," Petitioner failed to provide any evidence demonstrating a loss of effectiveness in the school system.[4/] Accordingly, Petitioner did not establish, by a preponderance of the evidence, that Respondent's conduct amounted to "misconduct in office."

38. Petitioner further alleges in Count B, that just cause also exists to terminate Respondent's employment based upon her commission of an act of "immorality," which is defined as:

> [C]onduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

Fla. Admin. Code R. 6B-4.009(2).

39. Pursuant to the above-definition, it was incumbent upon Petitioner to demonstrate that Respondent engaged in behavior "inconsistent with the standards of public conscience and good morals, and (b) that the conduct was sufficiently notorious so as to [1] disgrace the teaching profession *and* [2] impair [Respondent's] service in the community." McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996)(italics in original).

40. In the instant case, Petitioner did not offer any persuasive evidence establishing the applicable "standards of public conscience and good morals." Fla. Admin. Code R. 6B-4.009(2); McNeill, 678 So. 2d at 477. As a result, the undersigned cannot determine whether Respondent violated such public standards, and, therefore, must conclude that Petitioner has failed to meet its burden of proof with respect to this charge. See Miami-Dade Cnty. Sch. Bd. v. Eskridge, Case No. 10-9326, 2011 Fla. Div. Adm. Hear. LEXIS 62, *28-29 (Fla. DOAH Apr. 6, 2011)(finding school security monitor not guilty of immorality where school board presented no evidence establishing the applicable standards of public conscience and good morals); Broward Cnty. Sch. Bd. v. Deering, Case No. 05-2842, 2006 Fla. Div. Adm. Hear. LEXIS 367, *12 (Fla. DOAH July 31, 2006)(finding educator not guilty of immorality where school board "did not

offer any persuasive evidence establishing the applicable "standards of public conscience and good morals.").

41. Even if Respondent's conduct were inconsistent with the prevailing standards of public conscience and good morals, however, the evidence is insufficient to persuade the undersigned that her conduct was sufficiently notorious both to cause her (or her profession's) public disgrace or disrespect and to impair her service in the community.

42. As commonly used, the term "notorious" means "generally known and talked of" or "widely and unfavorably known." See Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/notorious>. The School Board presented no persuasive evidence that Respondent's conduct had become widely and unfavorably known. Even if Respondent's conduct were shown to have been notorious, however, there is no persuasive evidence that she (or the teaching profession) was publicly disgraced or disrespected in consequence of such notoriety.

43. Finally, there is no evidence that Respondent's ability to serve in the community has been impaired. Indeed, the incident did not preclude her from continued employment in the community, wherein she continued to be of service, as a school social worker, at the time of the hearing.

44. In sum, Petitioner failed to establish, by a preponderance of the evidence, that Respondent's conduct amounted to immorality.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is hereby

RECOMMENDED that the Broward County School Board enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 18th day of June, 2013, in Tallahassee, Leon County, Florida.

TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of June, 2013.

ENDNOTES

[1/] At the outset, it is worth noting that the propriety of Respondent seeking injunctive relief against the minor student is not at issue.

[2/] Effective April 5, 1983, Florida Administrative Code Rule 6B-4.009 was transferred to Florida Administrative Code Rule 6A-5.056. For the sake of consistency with the allegations of the

Administrative Complaint, rule 6A-5.056 will be referenced herein as 6B-4.009.

[3/] The undersigned concludes that while Respondent's conduct violated or denied A.W.'s legal rights as set forth below, the evidence presented fails to establish that Respondent did so intentionally, a required element for the establishment of a violation of rule 6B-1.006(e). See Forehand v. Sch. Bd. of Gulf Cnty., 600 So. 2d 1187 (1st DCA 1992)(noting the word "intent" denotes that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it). Similarly, assuming, *arguendo*, that Respondent's conduct exposed A.W. to unnecessary embarrassment or disparagement, the evidence presented fails to establish Respondent intended to do so, and, therefore, Respondent has not violated rule 6B-1.006(f). Finally, Respondent's attachment of A.W.'s records to the Petition did not result in any gain or advantage to Respondent.

[4/] "Misconduct in office" may be established, even in the absence of "specific" or "independent" evidence of impairment, where the conduct engaged in by the teacher is of such a nature that it "speaks for itself" in terms of its seriousness and its adverse impact on the teacher's effectiveness. In such cases, proof that the teacher engaged in the conduct is also proof of impaired effectiveness. See Purvis v. Marion Cnty. Sch. Bd., 766 So. 2d 492, 498 (Fla. 5th DCA 2000); Walker v. Highlands Cnty. Sch. Bd., 752 So. 2d 127, 128-29 (Fla. 2d DCA 2000). Respondent's conduct, however, is not sufficiently egregious by its very nature to demonstrate her ineffectiveness in the school system.

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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.