

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF
EDUCATION,

Petitioner,

vs.

Case No. 13-0789PL

ERICH HAMACHER,

Respondent.

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RECOMMENDED ORDER

On May 14, 2013, a hearing was conducted on the Administrative Complaint issued by Petitioner, Pam Stewart as Commissioner of Education, before Administrative Law Judge Lisa Shearer Nelson in Lake City, Florida.

APPEARANCES

For Petitioner: J. David Holder, Esquire
387 Lakeside Drive
Defuniak Springs, Florida 32435

For Respondent: Joan Stewart, Esquire
FEA/United
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Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent, Erich Hamacher, violated section 1012.795(1)(j), Florida Statutes (2010), and Florida Administrative Code Rule 6B-1.006(3)(a) or (5)(a), and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On November 30, 2012, Petitioner filed an Administrative Complaint against Respondent, alleging that he violated section 1012.795(1)(j), and rule 6B-1.006(3)(a) and (5)(a). The charges against Respondent are based upon the factual allegations that a child in his classroom suffered a dislocated kneecap while in his class and that Respondent directed another staff member to rewrite a Daily Activities Form to omit any reference to the child being in pain. On January 9, 2013, Respondent, through counsel, filed an Election of Rights form with Petitioner, disputing the allegations in the Administrative Complaint and requested a hearing pursuant to section 120.57(1), Florida Statutes. On March 5, 2013, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On March 12, 2013, a Notice of Hearing was issued scheduling a hearing for May 14, 2013. The parties filed a Joint Prehearing Stipulation on May 7, 2013, in which the parties identified facts about which there are no dispute that, where relevant, have been incorporated into the findings of fact below. The hearing proceeded as scheduled, and Petitioner presented the testimony of P.M., A.M.'s mother; Laura Hunter; Nikila Scippio; Jo Rowe; John Crawford; Lakasia Portee-Jones; Serena Flowers; Robin Talley; Jonathan Jordan; and Frank Moore. Petitioner's Exhibits P1-11

were accepted into evidence. Respondent testified on his own behalf and presented the testimony of John Cole, John Brown, and Beverly James. Respondent's Exhibits R1-6 were admitted into evidence. Because Respondent's Exhibits R2-3 contain pictures of students both in and outside of the classroom, those exhibits are being transmitted by separate, sealed envelope. Petitioner recalled Nakila Scippio in rebuttal.

The one-volume Transcript of the proceedings was filed with the Division on June 3, 2013. Both parties timely filed their Proposed Recommended Orders on June 13, 2013, and they have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent holds Florida Educator's Certificate number 749876, covering the areas of Emotionally Handicapped and Specific Learning Disabilities, which is valid through June 30, 2012. He has been teaching in Florida since approximately 1995.

2. At all times relevant to the allegations in the Administrative Complaint, Respondent was employed as an Intellectual Disabilities Teacher at Richardson Middle School in the Columbia County School District.

3. At that time, Respondent was teaching in a classroom that was identified as a classroom for students who were profoundly mentally handicapped. There were approximately eight

students in his classroom, with four student-care attendants. None of the students in the classroom were verbal, and at least one did not walk.

4. The allegations in the Administrative Complaint stem from an incident taking place on February 3, 2011, with respect to one of Respondent's students, A.M. At the time of the incident, A.M. was 19 years old. For reasons that were not explained in the record, A.M. lost his vision, speech, and hearing at the age of six. He is non-verbal, but generally regarded as a happy child. However, he does suffer from mood swings that can make him difficult to control because of his inability to communicate. When he has these mood swings, according to his mother "he doesn't want to be messed with" and "would push you away." A.M. is very strong, has a high tolerance for pain, walks with a limp, and is stronger on his left side than his right.

5. A.M. has attended Richardson Middle School for approximately five years. For the 2010-2011 school year, he was in Mr. Hamacher's classroom.

6. Typically, A.M.'s mother would walk him to the school bus, and he would use a tapping cane. She would assist the bus driver, Serena Flowers, in putting him on the bus, and he would sit directly behind Ms. Flowers on the way to school. Once they arrived, Nakila Scippio, his personal care attendant, and

Ms. Flowers would help A.M. get off the bus and Ms. Scippio would walk with him to his classroom.

7. Ms. Scippio was assigned exclusively to A.M., as he required one-on-one supervision. This was her first employment as a student-care assistant, and she did not finish out the school year in that position. Student-care assistants needed to obtain permission from the assigned instructor to call parents or other school officials, such as the school nurse. In this case, Ms. Scippio would have been required to seek permission to make any such calls from Mr. Hamacher.

8. The evening of February 2, 2013, A.M. was agitated and restless, and according to his mother, "did not want anybody to mess with him." On February 3, 2011, A.M. walked to the bus as usual, and walked to his classroom with Ms. Scippio. However, from the beginning of the school day it was apparent that A.M. was not having a good day. He was climbing all over the classroom, throwing tantrums, scooting and sliding across the floor, and trying to take his clothes off. He refused to eat breakfast. Because of his vision loss, someone had to walk with him around the classroom, and his behavior was not acceptable.

9. Although A.M. did not usually cry at school, he was crying that morning. At some point in the morning, Respondent placed his hands on A.M.'s shoulders to place him on a mat on the floor of the classroom. Although his actions were firm, the more

persuasive evidence is that he did not act in a way that would injure the child. A.M.'s immediate response was to jump up, and then went to the therapy table/mat where he lay down. He remained on the mat for the rest of the day, sometimes moaning and crying.

10. While it is unclear what caused A.M.'s behavior that day, it is clear that the behavior was unusual for him at school. No one seemed to know why he was crying: while Ms. Scippio testified that she thought he was in physical pain, Mr. Hamacher thought the pain was emotional, and Mr. Crawford, his mobility therapist, thought he appeared to have a stomachache. However, no one testified that A.M. was holding his leg or knee during the day.

11. While it was apparent that A.M.'s behavior was not normal for him, Respondent did not call the principal and did not call the nurse. He explained at hearing that the principal was not on campus that day, and that the nurse left early. Lakasia Portee-Jones, the school nurse, confirmed that she left the campus for the day at 12:45, but did not receive a call before she left. At approximately 10:00 a.m., Respondent called P.M., A.M.'s mother, to discuss an upcoming I.E.P. meeting, but mentioned no injury to her. Respondent did report to P.M. that A.M. had been crying during the morning. She reported that he had had a bad night the night before, and said if it continued,

she would come and get him. Respondent assured her he would be fine. However, A.M. continued to cry or moan for the rest of the school day.

12. Although it is unclear what was causing A.M.'s behavior at that point, some effort should have been made to determine why this non-verbal child was in such distress, regardless of whether the pain was physical or emotional. While calling the principal was not an option, and the school nurse was only available for part of the day, Respondent had no plausible explanation for not contacting the nurse earlier in the day, or for not contacting an assistant principal or other member of the administrative staff for assistance.

13. A.M. usually wore pull-ups and needed assistance with toileting. On the day in question, he wet himself not once but twice, soaking through his clothes. This was also unusual. The student-care attendant normally deals with changing a student, but Mr. Hamacher was helping her because A.M. was being combative. The second time he was changed was immediately before the time to board the bus to go home. At that time, Mr. Hamacher noticed A.M.'s knee "go out" and then it appeared to him that it slipped back in. He was not overly concerned at the time because A.M.'s mother had reported (and she confirmed in her testimony at hearing) that his knee has slipped out on occasion in the past, and that she did not know how it happened.

14. Mr. Hamacher determined that the best thing for A.M. was for him to go home. He did not call A.M.'s mother again. He helped Ms. Scippio place A.M. in a wheelchair, because he would not stand on his leg, so that he could be transported to the school bus to go home. Ms. Scippio escorted him to the bus in the wheelchair.

15. Serena Flowers has transported A.M. for several years. When she saw Ms. Scippio wheeling him to the bus, she asked what was wrong. Ms. Scippio told her that she did not know, but something was wrong with his leg. Ms. Flowers could see that something was out of place, so she picked up A.M. and carried him up the stairs of the bus and placed him in his seat. Ms. Flowers then called A.M.'s mother and told her something was wrong with his leg, and asked P.M. to meet her at the school board building. When P.M. met Ms. Flowers, P.M. could tell immediately that A.M.'s knee was out of place. The two adults transferred A.M. from the bus to P.M.'s car, and she took him to the emergency room at Lake City Medical Center.

16. In the emergency room, medical staff popped A.M.'s knee back into place and he was given a knee brace to wear in order to stabilize it. No prescription was given, and A.M. was walking around on his leg by the evening. He stayed home for a few days, and then returned to school. A.M. wore the brace for a couple of weeks and then would not wear it any longer.

17. The children in Mr. Hamacher's class had Daily Activity Reports (DAR) that went home each day to notify the parents of the type of activities conducted, behaviors noted, and any needed supplies to send from home. It is unclear what time of day the notes were usually completed. Ms. Scippio would prepare the DAR for Mr. Hamacher's review, and then he would sign them.

18. For February 3, 2013, Ms. Scippio prepared a note that A.M. had urinated twice in his clothes, and that extra clothes needed to be sent in. She circled the preprinted items as follows: problem behavior; kicking staff; and pulling on staff. She also wrote under comments, "[A.M.] cried this a.m. and climbed on top of furniture seemed to be in pain." Mr. Hamacher told her to re-write the note, stating only the facts. The note as re-written included the same information as the first, except the written comments about A.M. climbing on the furniture and seeming to be in pain were omitted, and the behavior "had tantrums" was also circled. The note signed by Mr. Hamacher still indicated that A.M. cried in the a.m. Mr. Hamacher explained that he believed the crying stemmed from emotional, as opposed to physical, pain and that a factual statement was more appropriate.^{1/}

19. The note that went home was not falsified. As Ms. Scippio stated at hearing, she was told to include "just the facts" as opposed to opinion. While the note was not falsified,

Respondent should have called A.M.'s mother once he knew that there was any type of injury to A.M.

20. The following day, P.M. called the school and spoke to the principal. She was upset that no one had called her about A.M.'s injury. As she stated at hearing, "I'm not here for his job. All I'm wanting to know is why nobody called me. Nobody called and let me know that he had hurt his leg. They took him to the bathroom. Somebody should have noticed that his leg was out of socket. That's all I was mad about. Nobody notified me. I'm not after anybody's job. I just want an answer why nobody called me."

21. School officials met with Mr. Hamacher and with P.M. to determine what happened. Mr. Hamacher was notified that Principal Whitfield was recommending that he be suspended for a period of three days without pay. The four bases listed for the discipline were that he did not fill out an accident report; did not send the child to the nurse; did not communicate to A.M.'s parent that an injury may have occurred; and did not report injuries to an administrator.

22. On or about February 10, 2011, the Columbia County School Board suspended Respondent without pay for three days as a result of his conduct on February 3, 2011, regarding student A.M.

23. After his suspension, Respondent returned to the same classroom and A.M. remained in his classroom for the remainder of the school year.

24. Mr. Hamacher's evaluation for the 2010-2011 school year was completed March 23, 2011, some five to six weeks after the three-day suspension. He received a satisfactory evaluation, with very effective marks for planning and preparation, technology, and collaboration. The comments section of the evaluation stated: "Mr. Hamacher is well organized compassionate and able to work collaboratively with his team of care attendants while accepting responsibility for everything in this challenging area of student education." His prior evaluations were also satisfactory or very effective, and contain positive comments regarding his performance.

25. The evidence presented at hearing indicates that Respondent is a good teacher and is dedicated to the well-being of his students. He strives to ensure that his students reach their full potential and to be able to contribute to society despite their limitations.

26. With the exception of the suspension imposed for this incident, there is no evidence that Respondent has ever been disciplined by the School District. Likewise, there is no evidence that Respondent's certification has been disciplined by the Education Practices Commission. When he received his

original certification, it was issued subject to a two-year probationary period as a result of prior conduct disclosed on his application. However, that conduct was considered in the initial licensure process and bears no relationship to the conduct at issue in this case.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.57(1), Florida Statutes (2012).

28. This is a proceeding in which Petitioner seeks to revoke Respondent's educator certification. Because disciplinary proceedings are considered penal in nature, Petitioner is required to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

29. As stated by the Florida Supreme Court:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

30. The Administrative Complaint alleges the following facts as a basis for imposing discipline

3. On or about February 3, 2011, the Respondent was present in his classroom for the purpose of supervising approximately seven students with the assistance of a student care attendant. During the school day one of Respondent's students, A.M., a nineteen year old ESE student, suffered a dislocated right knee cap. Despite indications that the student was in pain and discomfort, the Respondent failed to seek medical assistance, did not send the student to the school nurse, did not fill out an accident report, and did not report to an administrator or to the child's parent that an injury may have occurred.

4. At the end of the school day the student care attendant prepared a Daily Activities Report for A.M. which indicated that A.M. seemed to be in pain. Upon reviewing the form the Respondent instructed the attendant to throw away the form and complete another one which omitted any information about the student being in pain. After complying with the Respondent's directive to prepare another report, student A.M. was taken to his bus in a wheelchair and lifted into a seat.

5. The student was subsequently taken to a hospital by his parent where he was diagnosed with a right patellar dislocation.

6. On or about February 10, 2011, the Columbia County School Board suspended the Respondent without pay for three days as a result of the conduct described herein.

31. Based on these factual allegations, Petitioner has charged Respondent with violating section 1012.795(1)(j), as well as Florida Administrative Code Rules 6B-1.006(3)(a) and 6B-1.006(5)(a).

32. Rule 6B-1.006, which delineates the Principles of Conduct for the Education Profession in Florida, provides in pertinent part:

(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.

* * *

(5) Obligation to the profession of education requires that the individual:

(a) Shall maintain honesty in all professional dealings.

33. Count 1 of the Administrative Complaint alleges that Respondent violated section 1012.795(1)(j), which makes it a disciplinary offense to violate the Principles of Conduct for the Education Profession in Florida. Determination of whether Respondent has violated section 1012.795(1)(j) necessarily rests on a determination of Counts 2 and 3.

34. Count 2 of the Administrative Complaint asserts that Respondent violated rule 6B-1.006(3)(a), by failing to protect A.M. from conditions harmful to learning and/or to the student's

mental and/or physical health and/or safety. In support of this charge, Petitioner asserts that Respondent actually caused the injury to A.M. by forcefully placing A.M. on the floor mat. However, no such allegation was made in the Administrative Complaint.

35. Respondent can be disciplined only for matters alleged in the charging document. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); and Willner v. Dep't of Prof. Reg., 563 So. 2d 805 (Fla. 1st DCA 1990). Thus, the inquiry is limited to those factual matters actually alleged in the Administrative Complaint: that an injury occurred while in Respondent's classroom; that Respondent failed to seek medical assistance; did not send A.M. to the school nurse; did not fill out an accident report; and did not report to an administrator or to the child's parent that an injury may have occurred.

36. Because Petitioner did not allege that Respondent's actions caused A.M.'s injury, such a claim cannot be used as a basis for imposing discipline against Respondent. Moreover, the evidence does not support such a finding. The more persuasive evidence is that A.M. was crying before he lay down on the mat, and before Respondent placed him there. Ms. Scippio testified that his initial reaction to Mr. Hamacher's placing him on the mat was to jump up, which is inconsistent with his dislocating

his knee at that time. While undoubtedly A.M. dislocated his knee at some time during the school day, there was no clear and convincing evidence to indicate when the injury occurred.

37. However, the evidence is clear and convincing that while the cause for his actions was unknown, A.M. was acting in a way that was inconsistent with his normal behavior. A.M. is a child who by all accounts rarely, if ever, cries at school. He was described as being a happy child, although subject to mood swings. Most importantly, he is a child who cannot tell anyone whether he is in pain or if he has hurt himself. While the opinions regarding the cause for his behavior differed, all of the witnesses seemed to agree that A.M. was not feeling well on February 3, 2011. Given A.M.'s inability to convey the cause for his behavior, it was incumbent upon Respondent to seek assistance from administration, and when the behavior continued, to notify A.M.'s parent.

38. Respondent testified that he first noticed A.M.'s knee "slip" at the very end of the day, while he was being changed. He testified that he did not realize the extent of the injury, although he does now. Regardless, once he knew that there was an injury, it was incumbent upon him to notify A.M.'s parent. In this limited extent, Petitioner has proven by clear and convincing evidence that Respondent violated rule 6B-1.006(3)(a).

39. The same cannot be said for the alleged violation of rule 6B-1.006(5) (a), which requires a teacher to maintain honesty in all professional dealings. Respondent was the person responsible for signing Daily Activity Forms that were sent home with the students in his class. The first form prepared by Ms. Scippio, contained a statement with which Respondent did not agree. He maintained consistently throughout the proceeding that he felt A.M. was suffering from emotional, as opposed to physical, pain. As stated by Ms. Scippio, the primary witness with respect to this issue, Respondent told her to prepare a DAR with "just the facts," which included the notation that A.M. had cried in the morning, but omitted Ms. Scippio's original notation that A.M. seemed to be in pain. The fact that Respondent did not share Ms. Scippio's view does not make the statement dishonest.^{2/} This behavior is in stark contrast to that described in Smith v. Ivanyi, DOAH Case No. 09-6693 (DOAH July 15, 2010; EPC Mar. 7, 2011), where Ms. Ivanyi directed an aide to cut out a parent's signature from a document and affix it to a consent form in order to make it appear the parents had consented to a form of punishment for which they, in fact, had withheld permission. Telling an aide to write a note that contains "just the facts" is not a failure to maintain honesty in all professional dealings. Petitioner did not prove the violation in Count 3 by clear and convincing evidence.

40. Rule 6B-11.007 contains the Disciplinary Guidelines for establishing the appropriate penalties to be imposed for violations of section 1012.795 and rule 6B-1.006. For the failure to protect or supervise students in violation of rule 6B-1.006(3)(a), the penalty range is probation to revocation. Fla. Admin. Code R. 6B-11.007(2)(i)16.

41. The rule also contains aggravating and mitigating factors to consider in determining any deviation in penalty. Those factors include the severity of the offense; the number of repetitions of offenses; the length of time since the violation; any previous discipline by the Commission; the length of time the educator has practiced; the effect of the penalty on the educator's livelihood; any effort at rehabilitation by the educator; penalties imposed for related offenses; the degree of physical and mental harm to the student; and any other mitigating or aggravating factors under the circumstances. Fla. Admin. Code R. 6B-11.007(3).

42. This case dealt with a single child on one day. There are no allegations that Respondent has ever acted inappropriately on other occasions. To the contrary, Respondent has maintained positive evaluations both before and after this incident. The incident took place over two years ago, Respondent served the discipline imposed by the school district immediately after the incident, and A.M. remained in his class for rest of the school

year and into the following year. There was no evidence presented to indicate whether A.M. suffered any additional injury due to Respondent's failure to notify administrative staff or A.M.'s parent, although the lack of such evidence does not excuse the failure. Respondent has taught for over 15 years and has not been disciplined by the Commission previously, and has sought additional training since the incident to know how to handle these situations more effectively. Finally, the school district continues to employ him and has continued to rate him as an effective educator.

43. The undersigned has also considered the challenging nature of the particular teaching assignment Respondent held at the time, as well as the assignment he has now. When speaking about his students, Respondent's face lights up with a genuine love for them (including A.M., the child at issue) and an enthusiasm for his work that cannot be taught. To extinguish that enthusiasm would be a loss for the teaching profession. However, additional training would assist him in dealing with the issues that are unique to the population that he serves.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a Final Order finding Respondent guilty of Counts 1 and 2 of the Administrative Complaint and not guilty of Count 3. It is

further recommended that Respondent be placed on probation for a period of two years, a condition of which shall include an additional 20 hours of continuing education, in areas to be determined by the Commission.

DONE AND ENTERED this 9th day of July, 2013, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of July, 2013.

ENDNOTES

^{1/} Petitioner's assertion that Respondent directed Ms. Scippio to re-write the Daily Activities Report and omit reference to pain, and that this direction was given to hide from A.M.'s mother the fact that he had injured her son in his classroom and did nothing to help him is specifically rejected. The testimony shows that he told Ms. Scippio to include only the facts. The more credible evidence is that, while Respondent should have investigated what was actually wrong with A.M., he did not believe that A.M. was in physical pain.

^{2/} Neither does the statement attributed to Respondent that A.M.'s mother would over-react to a comment that her son was in pain. Most parents have a negative reaction to a statement that their child might be in pain, much less the parent of a child who cannot communicate. If Respondent truly did not believe that

A.M. was in pain, and his testimony to that effect is credited, it is understandable that he would not want to distress A.M.'s parent unnecessarily and would want to keep A.M. in a positive environment.

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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.