

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 13-1889

ARLETHA SCOTT,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference at sites in Tallahassee and Miami, Florida, on August 13, 2013, before Administrative Law Judge Mary Li Creasy of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Sara M. Marken, Esquire  
Heather Ward, Esquire  
Miami-Dade County School Board  
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For Respondent: Branden Vicari, Esquire  
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STATEMENT OF THE ISSUE

Whether just cause exists to suspend Respondent without pay for 30 days from her employment as a paraprofessional II with the Miami-Dade County School Board.

PRELIMINARY STATEMENT

At its regular meeting on May 8, 2013, Petitioner, Miami-Dade County School Board (Petitioner or School Board), voted to suspend Respondent, Arletha Scott, without pay for a 30-day period.

Respondent timely requested a formal administrative hearing to contest Petitioner's action. On May 17, 2013, the matter was referred to the Division of Administrative Hearings (DOAH) for further proceedings. On July 26, 2013, Petitioner filed its Notice of Specific Charges alleging that on January 28, 2013, Respondent walked a student to the wall, grabbed the student by the legs, and pulled on them resulting in the student falling to the ground.

Based upon the allegations, Petitioner charged Respondent with misconduct in office (Count I), violation of School Board policy (Standards of Ethical Conduct, Count II), violation of School Board policy (Code of Ethics, Count III), violation of School Board policy (Student Supervision and Welfare, Count IV), and violation of School Board policy (Corporal Punishment and Use of Reasonable Force, Count V).

At the final hearing, which took place on August 13, 2013, Petitioner called the following witnesses: Carmen Gutierrez, Juan J. Fernandez, Darryl Nattiel, and Martha Blandon-Munoz. Petitioner's Exhibits 1 through 5, 8, and 21 were admitted in evidence without objection. Respondent testified on her own behalf.

The final hearing Transcript was filed on September 30, 2013. Petitioner and Respondent timely filed proposed recommended orders that have been considered in the preparation of this Recommended Order.

Unless otherwise noted, citations to the Florida Statutes refer to the 2013 version.

#### FINDINGS OF FACT

1. Petitioner is the duly constituted School Board charged with the duty to operate, control, and supervise all free public schools within Miami-Dade County, Florida, pursuant to Article IX section 4(b), Florida Constitution, and section 1001.32, Florida Statutes.

2. At all times material to this proceeding, Respondent was employed as a paraprofessional II at Gateway Environmental K-8 Learning Center (Gateway), a public school in Miami-Dade County, Florida. Respondent has been employed in the public school system for approximately 25 years.

3. Beginning in September 2012, Respondent was assigned to provide classroom support to a second and third grade combined special education class for students with learning disabilities. Her duties included assisting the classroom teachers and physical education (P.E.) instructors with the students as needed, assisting the students when moving from one part of the school to another, and assisting with the sanitary needs of some disabled students.

4. On January 28, 2013, during the second interval class of the school day, Respondent escorted her students to P.E. and stayed with them to assist. Shortly after the P.E. class began, Respondent had a verbal altercation with a student, J.D.

5. Prior to the altercation with Respondent, J.D. was standing with her classmates while receiving warm up exercise instruction from Coach Darryl Nattiel (Nattiel). J.D. was not observed disturbing other students or being disruptive in any way. Nattiel did not tell Respondent that J.D. was forbidden from participating in class or that J.D. was refusing to respond to his instructions, nor did he instruct Respondent to move J.D. to sit by the wall.<sup>1/</sup>

6. Respondent directed J.D. to "go sit by the wall." When J.D. did not respond, Respondent repeated the directive several times in a stern manner. This was heard by Coach Juan J. Fernandez (Fernandez) who was present on the playground and was

taking attendance when the altercation began. Fernandez said something to J.D. in an attempt to get her to sit in order to end the confrontation.

7. When J.D. refused to follow Respondent's directive, Respondent grabbed J.D. by the arm, swung her around, and pulled J.D. to a point where J.D.'s back was against the wall. Respondent continued aggressively directing J.D. to sit.

8. J.D. did not immediately sit. While facing J.D., Respondent bent forward, grabbed J.D. by the legs, pulled them forward, and forced her into a sitting position on the ground.

9. Although Fernandez observed this interaction from a short distance away, he did not address it with Respondent immediately because he did not want to overstep Respondent's authority.

10. J.D. appeared to be upset by the incident.

11. The incident between Respondent and J.D. was recorded by a video camera which overlooks the playground area where this occurred. In the video, the view is partially obstructed by a column. However, the interaction between Respondent and J.D. immediately before J.D. is placed against the wall is clearly visible in the video. J.D. does not appear to be disrupting the class in any way and does not physically show aggression towards Respondent. The recording does not contain audio.

12. Prior to the end of the class, Respondent filled out an incident report in which she complained that J.D. failed to respond to her instructions, was aggressive towards Respondent, and used profanity directed at Respondent. The alleged aggression and use of profanity by J.D. was not observed by Fernandez or Nattiel.

13. When the class was returning to the classroom, Fernandez notified J.D.'s teacher about the incident with Respondent. The teacher advised Fernandez to report the situation to the main office. Fernandez reported the situation to Carmen Gutierrez (Gutierrez), who was principal of Gateway at that time.

14. On March 20, 2013, a conference for the record (CFR) was held with Respondent and her union representative. Respondent was apprised of the probable cause finding against her for violations of the following School Board Policies: 4210, Standards of Ethical Conduct; 4210.01, Code of Ethics; 4213, Student Supervision and Welfare; and 5630, Corporal Punishment and Use of Reasonable Force. A 30-day suspension without pay was the recommended discipline.

15. Respondent contends that she was merely trying to redirect a disruptive student who had cursed at her and is known for kicking others.

16. Respondent's claims, that the student was not allowed to participate in class, failed to follow Nattiel's instructions, was disruptive and verbally abusive towards Respondent, and needed to be placed against the wall, were not persuasive in light of the more credible testimony of the other witnesses and the video recording of the incident.

Ultimate Factual Determinations

17. The greater weight of the evidence establishes that Respondent was guilty of misconduct in office.

18. The greater weight of the evidence establishes that Respondent violated the Standards of Ethical Conduct.

19. The greater weight of the evidence establishes that Respondent violated the Code of Ethics in the Education Profession.

20. The School Board failed to prove by a preponderance of the evidence that Respondent violated School Board Policy 3214 regarding student supervision and welfare.

21. The greater weight of the evidence establishes that Respondent, when dealing with the student, used excessive force.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the parties to and the subject matter of these proceedings pursuant to sections 120.569 and 120.57(1), Florida Statutes.

23. Because Petitioner seeks to terminate Respondent's employment, which does not involve the loss of a license or certification, Petitioner has the burden of proving the allegations in its Notice of Specific Charges by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

24. The preponderance of the evidence standard requires proof by "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. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000) (relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997)) (quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

25. Article XXI, Section 2, of the applicable collective bargaining agreement provides:

Dismissals and suspensions shall be effected in accordance with applicable Florida statutes, including the Administrative Procedures Act (APA), and provisions stated below:

a. No employee shall be suspended until all of the detailed specific charges have been made known to the employee, in writing, provided, further, that said employee is entitled to be represented by one



representative of the union in conference with the office of professional standards administrator or his/her designee.

26. Respondent is considered "instructional personnel" as defined in section 1012.01(2)(e), Florida Statutes.

Section 1012.33(6) provides:

Any member of the instructional staff, excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a). The district school board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid.

27. In accordance with section 1012.33(1)(a), "just cause" includes "misconduct in office" as defined by rule of the State Board of Education.

#### The Alleged Violations

28. Petitioner's Notice of Specific Charges alleges that Respondent's above-described conduct resulted in the following violations:

Count I - Florida Administrative Code Rule 6A-5.056, Misconduct in Office; Rule 6A-10.080, Code of Ethics in the Education Profession; Rule 6A-10.081, Principles of Professional Conduct;

Count II - School Board Policy 4210, Standards of Ethical Conduct;

Count III - School Board Policy 4210.01, Code of Ethics;

Count IV - School Board Policy 4213, Student Supervision and Welfare; and

Count V - School Board Policy 5630, Corporal Punishment and Use of Reasonable Force.

Count I - Misconduct in Office

29. Misconduct in Office is defined in rule 6A-5.056 as:

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6B-1.001, F.A.C. (currently Rule 6A-10.080, 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. (currently Rule 6A-10.081, 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 colleagues' ability to effectively perform duties.

30. Rule 6A-10.081, Code of Ethics of the Education Profession in Florida, provides:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic

citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

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

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

31. Rule 6A-10.081, Principles of Professional Conduct for the Education Profession in Florida, provides in relevant part:

(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.

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

(f) Shall not intentionally violate or deny a student's legal rights.

32. Respondent's actions of grabbing a student by the arm, swinging her around, placing her against a wall, and then pulling her legs from under her causing the student to fall on her buttocks on the ground were unnecessary and unjustified, particularly in light of the fact that the student was not observed being disruptive or aggressive. Respondent's actions towards J.D. showed a lack of professional judgment and integrity.

33. For the reasons set forth above, the School Board proved that Respondent was guilty of misconduct in office as defined in rule 6A-5.056; rule 6A-10.081, Code of Ethics of the Education Profession in Florida; and rule 6A-10.081, Principles of Professional Conduct for the Education Profession in Florida.

Count II - Standards of Ethical Conduct

34. School Board Policy 4210, Standards of Ethical Conduct, provides in relevant part:

A support staff member with direct access to students shall:

A. make a 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.

B. not unreasonably restrain a student from independent action in pursuit of learning.

C. not intentionally expose a student to unnecessary embarrassment or disparagement.

\* \* \*

S. not use abusive and/or profane language or display unseemly conduct in the workplace.

35. Respondent's actions of grabbing the student by the arm, swinging her around, and pulling her legs out from under her to make her sit on the floor are wholly inconsistent with Respondent's duty to protect the student from conditions harmful to learning. Respondent restrained the student from independent action and intentionally exposed the student to unnecessary embarrassment or disparagement.

36. For the reasons set forth above, the School Board proved that Respondent violated School Board Policy 4210, Standards of Ethical Conduct.

Count III - Code of Ethics

37. School Board Policy 4210.01, Code of Ethics, provides in relevant part:

All members of the School Board, administrators, teachers and all other employees of the District, regardless of their position, because of their dual roles as public servants and educators are to be bound by the following Code of Ethics. Adherence to the Code of Ethics will create an environment of honesty and integrity and will aid in achieving the common mission of providing a safe and high quality education to all District students.

As stated in the Code of Ethics of the Education Profession in Florida (State Board of Education F.A.C. 6B-1.001):

A. The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

\* \* \*

#### Conduct Regarding Students

Each employee shall:

A. 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;

B. not unreasonably restrain a student from independent action in pursuit of learning;

\* \* \*

E. not intentionally expose a student to unnecessary embarrassment or disparagement;

F. not intentionally violate or deny a student's legal rights;

38. The violations alleged in Counts II and III are virtually identical. For the reasons set forth above, the School Board proved that Respondent violated School Board Policy 4210.01, Code of Ethics.

Count IV - Student Supervision and Welfare

39. School Board policy 4213, regarding Student Supervision and Welfare, provides:

Protecting the physical and emotional well-being of students is of paramount importance. Each support staff member shall maintain the highest professional, moral, and ethical standards in dealing with the supervision, control, and protection of students on or off school property.

Staff shall:

\* \* \*

B. provide proper instruction in safety matters;

40. No evidence was presented that Respondent had a duty to "provide instruction in safety matters"--the violation with which Respondent was cited in the Notice of Specific Charges.

41. Accordingly, Respondent did not violate School Board Policy 3214 regarding student supervision and welfare.

Count V - Corporal Punishment and Use of Reasonable Force

42. School Board Policy 5630, Corporal Punishment and Use of Reasonable Force, provides:

Teachers or other designated members of the staff are authorized to control students assigned to them and shall keep order in the classroom.

Corporal punishment is strictly prohibited. Comprehensive programs for alternative discipline include, but are not limited to, counseling, timeout rooms, in-school suspension centers, student mediation and

conflict resolution, parental involvement, alternative education programs, and other forms of positive reinforcement.

\* \* \*

Instructional and support staff, within the scope of their employment, may use and apply reasonable force to quell a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects upon or within the control of the student, in self-defense, or for the protection of persons or property.

43. The persuasive evidence established that the student was not being disruptive or aggressive prior to being approached by Respondent. There was no need to grab the student by the arm, swing her around or place the student on the wall. There was certainly no justification for yanking the student's legs out from under her causing her to land on the floor.

44. For the reasons described above, the School Board proved that Respondent, when dealing with the student, used excessive force, thereby violating School Board Policy 5630.

45. Accordingly, there is "just cause," as required by section 1012.33, and the applicable collective bargaining agreement, for Petitioner to suspend Respondent from her employment as a paraprofessional for 30 work days without pay.



RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Miami-Dade County School Board, enter a final order sustaining the suspension of Respondent's employment without pay for 30 days.

DONE AND ENTERED this 14th day of October, 2013, in Tallahassee, Leon County, Florida.



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MARY LI CREASY  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of October, 2013.

ENDNOTE

<sup>1/</sup> There was conflicting testimony regarding whether Nattiel suggested to Respondent that J.D. was not allowed to participate in class as a result of J.D. not following instructions or participating in an activity. Respondent refused to directly answer the question whether Nattiel instructed her to have J.D. sit by the wall. Nattiel denied giving Respondent any such information or instruction and credibly explained that he would not have a student in this class sit out for refusing to participate in any activity. Nattiel explained that this class has students with varying physical capabilities and that he tailors his instruction to the individual needs for these students. It is common for some of the students to be unable to

participate in some of the activities and, therefore, they are not excluded from class on this basis.

COPIES FURNISHED:

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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.