

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. LUCIE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 13-3603TTS

DRU DEHART,

Respondent.

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RECOMMENDED ORDER

On December 9-11, 2013, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee and Port St. Lucie, Florida.

APPEARANCES

For Petitioner: David Miklas, Esquire
Leslie Jennings Beuttell, Esquire
Richeson & Coke, P.A.
Post Office Box 4048
Fort Pierce, Florida 34948

For Respondent: Mark Wilensky, Esquire
Dubiner & Wilensky, L.L.C.
Suite 103
1300 Corporate Center Way
Wellington, Florida 33414

STATEMENT OF THE ISSUES

The issues are whether Respondent is guilty of the alleged misconduct and, if so, whether such misconduct constitutes just

cause for Respondent's termination, pursuant to section 1012.33(6) (a), Florida Statutes.

PRELIMINARY STATEMENT

By Statement of Charges and Petition for Termination dated September 16, 2013 (Petition), Petitioner alleged that, on March 20, 2013, Petitioner engaged in "inappropriate conduct with students." The Petition does not elaborate what is meant by this allegation, so this appears to be only an introductory allegation of some sort.

The Petition alleges that a seventh-grade student, who was identified at the hearing as R. W., made a statement to Respondent during second-period class that provoked her. After class ended, Respondent allegedly approached another teacher, Kalyn Nova, and told her that R. W. had just said in class that he was going to physically assault Respondent.

The Petition alleges that Respondent "used inappropriate language either directly with or in the presence of students," but the Petition does not state either the language or otherwise describe what it was that Petitioner said that was inappropriate. Based on the allegations surrounding this allegation, Petitioner's opening statement (Tr. 15), and the testimony, this allegation refers to Respondent's utterance of the word, "shit," as she quoted to Ms. Nova what Respondent understood R. W. to have said to her.

The Petition alleges that two male eighth-grade students "became involved" with "this discussion with [Respondent] and sought permission to confront [R. W]."

Although there is no allegation of Ms. Nova's saying anything, the surrounding allegations make it clear that "this discussion" refers to Respondent's statement to Ms. Nova of what R. W. had said in class.

The Petition does not allege Respondent's response to the students' request. Instead, the Petition alleges that the two students left the classroom and walked directly to the classroom of R. W., and Respondent "observed and permitted this." The Petition alleges two more failures to act by Respondent: Respondent "was aware of, and took no action to address," the two students' leaving the classroom with R. W. and entering a third classroom. These are the three failures to act that are discussed below.

The Petition alleges that the two students escorted R. W. to a couple of different classrooms, where the students asked other eighth-grade male students to join them in the hall. Once in the hall, several eighth-grade male students allegedly struck R. W.

The Petition alleges that a media specialist passed the students in the hall on her way to Respondent's classroom. The Petition alleges that the students then brought R. W. into Respondent's classroom, where, in the presence of Respondent's

third-period class, the students made R. W. apologize to Respondent. Respondent allegedly responded that "I got my eighth-grade boys on you. You're not so tough now are you?" Respondent allegedly then told the eighth-grade boys, "Get him out of here."

The Petition alleges that the eighth-grade boys escorted R. W. out of Respondent's classroom and into a restroom. The Petition does not allege anything about what transpired in the restroom, but alleges that, after R. W. left the restroom, his sister confronted the boys in the hallway, drawing the attention of the Dean's clerk, who spoke with R. W. After doing so, the Dean's clerk allegedly visited Respondent and told her that R. W. had reported that Respondent had had her "eighth grade boys jump on him." The Dean's clerk allegedly advised Respondent that she would be reporting the incident to school administrators.

The Petition alleges that Respondent interfered with student witnesses in three respects. First, the Petition alleges that Respondent reassembled the eighth-grade boys behind a closed door in the back room of her classroom, where she told them that there would be an investigation during which they would have to provide statements. She allegedly told one of the students to write that he had heard R. W. curse at Respondent.

Second, the Petition alleges that Respondent made statements to her third-period class about what they had seen when the eighth-grade students had brought R. W. into the classroom.

Third, the Petition alleges that Respondent tracked down students from the second-period class during lunch and contaminated their memories of what they had heard R. W. say during class.

The Petition alleges that the incident generated widespread publicity.

At the end of the factual allegations, the Petition states that "the foregoing facts are fully discussed in the attached Report which is incorporated herein." The 29-page investigative report was prepared by the law firm representing Petitioner in this case. Notwithstanding the incorporation of this document into the Petition, the report is not a source of additional allegations of misconduct by Respondent. As the Petition states, the report is merely a discussion of the "foregoing facts" set forth in the Petition. Also, the document is a lengthy, wide-ranging investigative document that does not clearly identify the specific acts and omissions justifying the termination of Respondent's employment.

The Petition alleges that the above-described facts violate 46 provisions of law: School Board Policy 6.301(2), which requires a teacher to abide by the Code of Ethics, Principles of Professional Conduct, and the Standards of Competent and Professional Performance in Florida; Florida Administrative Code Rule 6A-10.080(2), which requires a teacher to exercise her best

professional judgment and integrity; rule 6A-10.080(3), which requires a teacher to strive to achieve and sustain the highest degree of ethical conduct; rule 6A-10.081(3)(a), which requires a teacher to make reasonable effort to protect the student from conditions harmful to learning or the student's mental or physical health or safety; rule 6A-10.081(3)(e), which prohibits a teacher from intentionally exposing a student to unnecessary embarrassment or disparagement; rule 6A-10.081(3)(h), which prohibits a teacher from exploiting a relationship with a student for personal gain or advantage; rule 6A-10.081(4)(c), which prohibits a teacher from using institutional privileges for personal gain or advantage; rule 6A-10.081(5)(a), which requires a teacher to maintain honesty in all professional dealings; rule 6A-10.092(5), which requires a teacher to adhere to and enforce administrative policies of the school, district rules, and State Board rules; rule 6A-10.094(3), which requires a teacher to practice instructional and social skills that help students to interact constructively with their peers by encouraging expressions of ideas, opinions and feelings; rule 6A-10.096(1), which requires a teacher to resolve discipline problems pursuant to the policies of the school, rules of the district and State Board, and Florida statutes; rule 6A-10.096(2)(c), which requires a teacher to identify inappropriate behavior and employ appropriate techniques for correction; rule 6A-10.096(4), which requires a teacher to use management

techniques appropriate to a particular setting; rule 6A-10.099(2), which requires a teacher to possess effective human and interpersonal relations skills and encourage and support behavior that reflects a feeling for the dignity and worth of other people; rule 6A-10.099(3), which requires a teacher to possess effective human and interpersonal relations skills and demonstrate instructional and social skills that assist others to interact constructively; rule 6A-10.099(4), which requires a teacher to possess effective human and interpersonal relations skills and provide leadership and direction for others by appropriate example; rule 6A-10.099(9), which requires a teacher to possess effective human and interpersonal relations skills and apply instructional and social skills in developing positive self-concepts; section 112.311(6), Florida Statutes, which requires a public employee to observe the highest standards of ethics; section 112.317(b), Florida Statutes, which prohibits any public employee from corruptly using or attempting to use her official position to secure a special privilege; School Board Policy 6.301(3)(b), which provides disciplinary action for immoral or indecent conduct, abusive or discourteous conduct or language to students, violation of any rule, violation of any safety rule, violation of any provision of the Code of Ethics, Principles of Professional Conduct, standards of Competent and Professional Performance or Code of Ethics for public officers, inappropriate

or disparaging remarks to or about students or exposing a student to unnecessary embarrassment or disparagement, or inappropriate methods of discipline; School Board Policy 6.302, which requires all employees to refrain from any speech, conduct, activity or behavior that is reasonably interpreted as abusive, profane, intolerant, menacing or intimidating, any act of violence, intimidation, abuse or harassment in the workplace, and any behavior that is reasonably interpreted as primarily motivated to harass, intimidate, unreasonably annoy, or threaten in the workplace; School Board Policy 3.40(1), which provides that a teacher's first obligation is to provide a safe, secure, and orderly learning environment; School Board Policy 5.32, which sets zero-tolerance for victimization of students; School Board Policy 1.20(1)(g), which provides that all students have the right to a safe and trusting environment; School Board Policy 3.43, which provides that all students shall have an educational setting that is safe, secure, and free from harassment of three types and retaliation of two types; the school's faculty-staff handbook, which imposes five duties and prohibitions on teachers; rule 6A-5.056(1), which prohibits immorality or conduct inconsistent with standards of public conscience; an uncited prohibition against moral turpitude; and rule 6A-5.056(2), which prohibits misconduct in office. The Petition alleges that these violations constitute

just cause for termination under section 1012.33, Florida Statutes.

Respondent duly requested a formal administrative hearing.

On December 9, 2013, the parties filed a Joint Prehearing Statement. Petitioner stated its position as follows:

"Petitioner alleges that Respondent's conduct violated [the sources cited in the Petition]." Elsewhere, though, the parties agreed that the "issues of law that remain for determination" are:

1. Whether Respondent did violate School Board rule 6.301(2).
2. Whether Respondent did violate School Board rule 6.301(3)(b)(vii) (immoral or indecent conduct).
3. Whether Respondent did violate School Board rule 6.301(3)(b)(ix) (abusive or discourteous language to . . . students, visitors or vendors).
4. Whether Respondent did violate School Board rule 6.301(3)(b)(xix) (violation of any rule, policy, regulation, or established procedure).
5. Whether Respondent did violate School Board rule 6.301(3)(b)(xxvi) (violation of safety rules).
6. Whether Respondent did violate School Board rule 6.301(3)(b)(xxix) (any violation of the Code of Ethics of the Education Profession, the Principles of Professional Conduct for the Education Profession, the Standards of Competent and Professional Performance, or the Code of Ethics for Public Officers and Employees).

7. Whether Respondent did violate School Board rule 6.301(3) (b) (xxxix) (inappropriate or disparaging remarks to or about students or exposing a student to unnecessary embarrassment or disparagement).

8. Whether Respondent did violate School Board rule 6.301(3) (b) (xxxviii).

Any inconsistency in the Prehearing Stipulation as to the legal provisions allegedly violated is irrelevant because the narrower statement of legal issues captures all that are necessary for the disposition of this case. However, the Prehearing Stipulation reduces the "issues of fact that remain for determination" to:

1. Whether [Respondent] used inappropriate language directly with or in the presence of students.

2. Whether [Respondent] then interfered with witnesses in 3 separate ways in order to have the witnesses recall events as she wanted them to.

On its face, the Prehearing Stipulation drops Respondent's three alleged failures to act. The opening statement does not identify individually the three failures to act as grounds for termination, although it alludes to them cumulatively in the assertion that Respondent allowed eighth-grade students to go after R. W. (Tr. 13) It appears that the failure to state in the Prehearing Stipulation the three failures to act stated in the Petition was inadvertent. No more than one hour of the 16.5 hours of hearing was devoted to the factual issues stated in the

Prehearing Stipulation. Nearly all of the remaining hearing time was devoted to Respondent's failures to act, and Respondent never objected to any of this evidence on the ground of relevance. It could be said that the parties tried these three issues by consent. Creel v. Dist. Bd. of Tr. of Brevard Comm. Coll., 785 So. 2d 1285 (Fla. 5th DCA 2001) (dictum) (employment termination case). It is probably more accurate, though, to note that the parties tried these three issues because they were identified in the Petition and their omission from the Prehearing Statement was inadvertent.

On October 28, 2013, Respondent filed an Unopposed Motion for Order Setting Forth Parameters of Confidential Student-Identifying Information. Among other things, the motion requested an Order sealing exhibits that mentioned the names of students. On October 29, 2013, the Administrative Law Judge entered an Order granting the motion, under the authority of Rhea v. Sante Fe College, 109 So. 3d 851 (Fla. 1st DCA 2013), but denying the request to seal exhibits. The Order requires the parties to redact student-identifying information from the exhibits, under authority such as Johnson v. Deluz, 875 So. 2d 1 (Fla. 4th DCA 2004).

At the hearing, Petitioner called 15 witnesses and offered into evidence 12 exhibits: Petitioner Exhibits 1-11 and 13. Respondent called six witnesses and offered into evidence no

exhibits. All exhibits were admitted except Petitioner Exhibits 3, 7-8, and 10-11.

Concerned with the delay in the filing of the transcript, on January 27, 2014, the Administrative Law Judge entered an Order on Filing Proposed Recommended Orders, which set a deadline of the earlier of ten days after the filing of the transcript or February 27, 2014, for the filing of proposed recommended orders. The court reporter filed the transcript on the following day, so proposed recommended orders were due to be filed by February 7, 2014.

Respondent filed a proposed recommended order on February 7, 2014. On the following workday, February 10, Petitioner filed an Opposed Motion for Extension of Time to File Proposed Recommended Order, requesting until February 14 to file its proposed recommended order because it had misunderstood the deadline stated in the January 27 Order. The motion is denied as moot, given the recommendation set forth below.

FINDINGS OF FACT

I. Introduction

1. Respondent has been teaching for 30 years. At all material times, she has held a professional service contract, pursuant to section 1012.33, Florida Statutes.

2. For the past 13 years, Respondent has taught at Northport K-8 School. She taught at this school until she was suspended

without pay, pending termination, for the incidents of March 20, 2013, which are the subject of this case.

3. During second period on March 20, 2013, Respondent was teaching a seventh-grade class. One of the students, R. W., misbehaved. Respondent cautioned him to sit down and be quiet. Instead of doing so, R. W. asked her, "How do you know that I'm the only one talking?" Respondent again instructed him to be quiet, to which the student replied, "I wish I could cuss a teacher out right now." Respondent did not reply. Several nearby students heard this exchange and nothing more of significance.

4. After the bell rang, R. W. proceeded to his next class, which was taught by Sandra Tyndale-Harvey, whose classroom is in the same hallway as Respondent's classroom.

5. During the three-or four-minute interval between second and third periods, Respondent visited another teacher, Kalyn Nova, whose classroom is between the classrooms of Respondent and Ms. Tyndale-Harvey.

II. "Inappropriate Language" and Three Alleged Failures to Act

6. Respondent told Ms. Nova about the incident involving R. W. during the previous period. Although she was speaking in a whisper, she was upset and was overheard by D. S., an eighth-grade student in Ms. Nova's third-period class.

7. According to D. S., he overheard Respondent tell Ms. Nova that R. W. had said to her: "If you don't shut the 'F' up, I'm going to beat the shit out of you," or words very close to that effect, including the abbreviated swear word, the unabbreviated swear word, and the threat of violence.

8. Ms. Nova and Respondent recalled the statement differently from D. S., but similar to each other. Ms. Nova testified that Respondent stated that R. W. had said, "If you don't stop talking to me, I'm going to beat the shit out of you." Respondent testified that R. W. had said, "If you say my name one more time, I'm going to slap the shit out of you," implying that this was what Respondent told Ms. Nova that R. W. had said.

9. The differences in language among all three statements are immaterial. All three versions capture a threat to physically beat Respondent and a hair-trigger precondition to the beating: failing to stop speaking or saying R. W.'s name one more time. All three versions also use the word, "shit."

10. Respondent's use of this vulgarity was not inappropriate for three reasons. First, Respondent was merely recounting what she understood that R. W. had said to her. Based on this record, Respondent was wrong; R. W. never said anything like this to her. But Respondent is not charged with fabricating this statement. Although R. W. did not say it, Petitioner has failed to prove that Respondent intentionally misquoted the statement, such that her

use of "shit" in Ms. Nova's classroom might have been inappropriate. It is at least as likely that Respondent misunderstood R. W. to have threatened Respondent using the word, "shit."

11. Second, Respondent was visibly upset when she recounted what she had thought R. W. had said to her. And third, despite the fact that she was upset, Respondent took a reasonable precaution--i.e., whispering--to avoid being overheard by other students, even though she was unsuccessful in this effort. Perhaps because she was upset, Respondent's speech was loud enough for a nearby student to overhear it.

12. After recounting R. W.'s statement to Ms. Nova, Respondent walked over to D. S. and M. B., who were seated next to D. S. D. S. knew Respondent because he had taken a class from her the previous school year. Respondent asked D. S. if he would talk to R. W. because he and R. W. were friends and see what was going on with him. The incident during second period was not the sole reason that Respondent might have wondered what was going on with R. W., whose behavior and academic performance had been deteriorating recently.

13. By this time, the bell had rung, and Respondent was walking toward the classroom door to return to her classroom. D. S. and M. B. asked Ms. Nova if they could go to the restroom. Ms. Nova said that they could, so D. S. and M. B. exited the

classroom directly behind Respondent, who held open the classroom door for them.

14. Hallway camcorders recorded much of what followed. The camcorders of main interest are identified in the video as Cameras 5 and 6. Located in close proximity to each other, these cameras display opposite ends of the same hallway. Thus, a person walking toward one camera will eventually walk off the bottom of the frame, only to appear at the bottom of the frame of the other camera.

15. A small portion of the hallway, directly beneath both cameras, is not covered by either camera, so a person would not instantly appear in the frame of the other camera as soon as she left the frame of the first camera. The video is timestamped to thousandths of a second, and, at least at the level of seconds, the times for the two cameras are closely synchronized. If the cameras are out of sync at all, it is by no more than a couple of seconds.

16. The video from Camera 6 reveals that Respondent held open the door for D. S., who passed through the door immediately ahead of Respondent. Respondent released the door, but, before it had swung closed, M. B. passed through the door a few steps behind D. S. Both boys walked in the direction of Ms. Tyndale-Harvey's classroom.

17. Rather than proceed in the opposite direction, toward her occupied classroom, Respondent stopped in the middle of the hallway and then followed the two boys for about six seconds, as they approached and stopped at the door of Ms. Tyndale-Harvey's classroom. Both boys looked directly at Respondent, who, for two to three seconds, might have talked to the boys, but it is impossible to know for sure because her back was to the camera.

18. Respondent suggests that she counseled the boys not to run in the hallway, but clearly they were not running. Also, considering that third period had already begun, it is unlikely that, even if two eighth-grade boys were running down the hall, Respondent would so diligently supervise them, even to the extent of following them down the hall for six seconds in the opposite direction of her classroom, and completely ignore the needs of the classroom of her students awaiting her arrival. It appears, then, that Respondent said something to the boys, and it had nothing to do with not running in the hallway.

19. Just before the boys entered Ms. Tyndale-Harvey's classroom, Respondent turned around and started to walk up the hall toward her classroom. Seven seconds after entering Ms. Tyndale-Harvey's classroom, D. S. and M. B. reentered the hallway with R. W. By this time, Respondent was out of range of Camera 6, but she was within range of Camera 5.

20. The video from Camera 5 reveals that Respondent did not immediately enter her classroom. Instead, for about ten seconds, Respondent stared down the hall in the direction of Ms. Tyndale-Harvey's classroom. Based on the timestamps on the two videos, Respondent saw D. S. and M. B. leave the classroom with R. W., and she saw the boys walk R. W. across the hall, where one of the eighth-grade boys opened the door of another classroom, which was occupied at the time. At this point, Respondent entered her classroom, so she did not see what followed in the hallway.

21. The circumstances under which R. W. left Ms. Tyndale-Harvey's classroom are difficult to establish. D. S. testified that he asked to talk to R. W., but he did not say whom he asked. R. W. testified that two boys--D. S. and A. S.--entered Ms. Tyndale-Harvey's classroom and asked the teacher if they could take R. W. because Respondent needed to talk to him. An especially reliable student witness, S. W., testified that she heard the boys tell R. W. that Respondent needed him, and he thus left the classroom with them.

22. Ms. Tyndale-Harvey testified that, by the time that she took attendance toward the beginning of third period, R. W. was not in her classroom. When she asked if anyone knew where he was, several of the students said that he was talking to Respondent.

23. The hallway was clear when the boys and R. W. left Ms. Tyndale-Harvey's classroom, so third period had started, but

it is possible that the teacher had not yet taken attendance by the time that R. W. had left. Given the statements of the other students and presence of D. S. and M. B. in the classroom for a total of only seven seconds, it is more likely than not that they persuaded R. W. to join them in the hall without informing or asking Ms. Tyndale-Harvey.

24. The video from Camera 6 reveals that no one left the second classroom to join D. S., M. B., and R. W. in the hall. The three boys went down the hall, still within range of Camera 6, but no longer being observed by Respondent. D. S. or M. B. ducked into a third classroom, from which, in short order, four students joined them in the hall.

25. Up to this point, R. W. was being escorted, but did not appear restrained. While standing in the hall at the door of the third classroom, R. W. stood by himself, only two or three steps from his classroom, but making no attempt to reenter his classroom.

26. However, almost immediately after the four boys joined D. W. and M. B. in the hallway, several of the boys physically confronted R. W., who tried to escape up the hall. One of the boys grabbed him after only a couple of steps and R. W. stumbled. Now surrounded by five or six boys, R. W. kneeled on the floor as the boys grabbed at and pushed him. One of the boys removed his

cloth belt and swatted at R. W.'s lower torso seven times, as three of the other boys held R. W. against the wall.

27. The evidentiary record does not establish that R. W. suffered any physical injuries as a result of this incident, whose intensity is impossible to describe. The boys are relatively far from Camera 6, and any views of R. W. are intermittent due to the movement of him and the other boys during the incident. Clearly, though, whatever level of intensity that the incident attained, tapered off considerably after about 30 seconds.

28. About one minute after the start of the incident, the media specialist, who has worked at the school in her present position and as a teacher for 28 years, entered the hallway and walked right by the boys. She gave them a look, but noted nothing out of order--besides, one hopes, the presence of six students loitering in the hall in the middle of third period.

29. The media specialist continued walking up the hall. The students followed her five or six steps behind. At this point, two students were holding R. W., possibly by his backpack, which had remained in place during the hallway incident. As these three boys approach Camera 6--and thus were clearly depicted right in front of the lens--the boys' grasp of R. W. is light, and R. W. is smiling. The other four boys are trailing the first three and are talking in pairs, paying no attention to R. W.

30. Based on the foregoing, Petitioner proved that Respondent was aware that D. S. and M. B. left Ms. Nova's classroom and headed toward R. W.'s classroom, departed Ms. Tyndale-Harvey's classroom with R. W., and walked across the hall with R. W. and opened the door of another, occupied classroom. Petitioner also proved, of course, that Respondent never intervened with the boys during these actions.

31. Petitioner proved that Respondent had just asked one of the boys to talk to R. W. before he left the classroom to visit Ms. Tyndale-Harvey's classroom. Even in a preponderance case, it is impossible to infer that Respondent knew or reasonably should have known that D. S.'s walking to and into Ms. Tyndale-Harvey's classroom meant that he was going to act on her request. But this is a reasonable inference as soon as D. S. emerged from the classroom with R. W., especially given the proximity in time between Respondent's request and D. S.'s action in retrieving R. W. from class.

32. Seeing D. S. and M. B. walking R. W. across the hall and open the door of another occupied classroom establishes the inference that Respondent knew or reasonably should have known that the boys were not merely going to talk to R. W. about what might be wrong. D. S. and M. B., as well as all of the other eighth-grade boys, were much larger than R. W., so D. S. and M. B. did not need allies in order to talk to R. W. safely. More

likely, the presence of allies was at least for intimidation, or worse.

33. The Petition alleges a duty to act based on Respondent's having just heard one or both of the students ask if they could confront R. W. The evidentiary record does not establish such a request. However, Petitioner's opening statement predicates the duty to act on Respondent's instruction to one of the boys to talk to R. W. (Tr. 15) As discussed in the Conclusions of Law, the point here is that Respondent has established a specific basis for notice and a heightened duty to act on Respondent's part, and basis alleged in the Petition--D. S.'s asking Respondent if he may confront R. W.--is close in time and content to the proved basis--asking D. S. to talk to R. W.

III. Interlude

34. The media specialist who had passed the boys in the hall was headed to Respondent's classroom to schedule an author visit. The media specialist entered the classroom and, four or five seconds later, so did the six students and R. W. The media specialist remained in Respondent's classroom for a little over one minute. About 20 seconds after she left the room, so did the six students and R. W.

35. The boys urged R. W. to apologize to Respondent. He did so once, but laughingly. Urged by the boys to apologize again, R. W. did so, the second time more sincerely. Respondent thanked

R. W. for the apology, but said that she was still going to have to write a referral. Respondent said nothing else to R. W.

36. The boys escorted R. W. down the hall, past his classroom, and into an adjoining hall, where they walked him into a restroom. From the video, it appears that one of the boys locked the door behind them. The boys remained in the restroom for less than one minute. R. W. then walked out of the restroom.

37. About 15 minutes after the boys had left Respondent's classroom, the Dean's clerk went by the classroom and informed Respondent that R. W. had told her that he had been "jumped in the boys' bathroom" by six boys. The clerk added that R. W. had told her that the boys had attacked him on Respondent's instruction. The clerk told Respondent that she was taking R. W. to the front office so he could tell administrators what had happened.

IV. Three Alleged Instances of Student Witness Tampering

38. Within three minutes after the clerk and Respondent parted, the six eighth-grade students involved in the hallway incident (plus another student who does not appear to have been involved) entered Respondent's classroom. They met with Respondent in a separate planning room that was in the back of the classroom. Respondent testified that she asked what had happened, and the boys told her about the incident in the hall--with one boy saying that he had removed his belt, but he had hit the floor with it. Respondent testified that they would have to tell the Dean

what they had done. About five minutes after entering Respondent's classroom, the six students left it.

39. On this record, it is impossible to find that that Respondent said anything more to the boys. It is thus impossible to find that Respondent tried to influence or interfere with these students in terms of what they would tell school investigators.

40. The second alleged instance of interfering with student witnesses involves Respondent's third-period class, which witnessed the eighth-grade students' production of R. W. before Respondent. One student from this class, D. D., testified that, after Respondent had finished meeting with the boys in the planning room, she asked the class what would R. W. have looked like if he had been beaten up, and the class responded with suggestions. Although this student testified that R. W. did not look as if he had been beaten up, he did not testify that Respondent ever followed up with the obvious question of whether R. W. looked as if he had been beaten up to the students.

41. Another student from this class, M. C., testified, but was not asked what Respondent had said to the class after talking to the boys in the planning room. The only other student from this class called as a witness, V. S., was also not asked about any comments that Respondent made to the class after talking to the boys in the planning room.

42. It appears that, at hearing, Petitioner decided not to press the second alleged instance of interference with student witnesses. Any implication by Respondent that R. W. did not look beaten up while he was in her classroom was no more an attempt to influence the students than a statement asking them to remember when R. W. was in the classroom: both statements were true.

43. Petitioner thus failed to prove any attempt by Respondent to influence student witnesses on these first two alleged occasions.

44. However, at lunch on the day of the incident, Respondent visited some of her second-period students in the cafeteria. Five students concerning this incident were called as witnesses: S. W., C. T., K. H., L. J., and J. R. All of them were in R. W.'s second- and third-period classes.

45. S. W. was an especially impressive witness. She also appeared to be quite fond of Respondent. S. W. testified that Respondent approached her and some friends while they were eating and asked if R. W. had said that he had been hurt, and S. W. replied that he had not. Respondent also asked if S. W. or her friends had heard R. W. say during second period, "If she opens her mouth one more time, I'm going to beat the shit out of her." Neither S. W. nor her friends could recall that; S. W. recalled that R. W. had said only, "Sometimes I wish I could curse out a teacher."

46. C. T. was at lunch when Respondent approached him and asked if he and his friends remembered when R. W. had said, "If this bitch won't shut up, I'm going to knock her on the floor." Neither C. T. nor his friends recalled this statement. C. T. testified that R. W. said in second period, "I wish I could cuss out a teacher right now."

47. K. H. testified that Respondent approached him at lunch and asked if he had heard R. W. say that "he wished he could knock that bitch the fuck out." K. H. replied that he not heard any such statement. K. H. testified that R. W. said that he had wished he could cuss out teachers, or words to that effect.

48. L. J. testified that he did not recall anything, except that Respondent approached him during lunch and asked if R. W. had said "anything about he was going to beat the shit out of me."

49. J. R. testified only that Respondent approached him at lunch and asked if he recalled that R. W. had used a curse word at her in class.

50. Petitioner has proved that Respondent asked leading questions to each of these five students. Although the leading questions framed what Respondent apparently had understood R. W. to have said, not a single witness recalled any such statement from R. W. Under the circumstances, including the fact that Respondent had no role in conducting an investigation of her acts and omissions, the leading questions constituted improper

influencing of student witnesses. Despite what Respondent understood R. W. to have said, the leading questions suggested to these student witnesses that R. W.'s statement was physically threatening, when it was not, and used one or more swear words, when it did not.

CONCLUSIONS OF LAW

51. DOAH has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1012.33(6)(a)2., Fla. Stat.

52. Petitioner has the burden of proving the material allegations by a preponderance of the evidence. Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

53. Section 1012.33(6)(a), Florida Statutes, provides for the dismissal, at any time, of an employee with a professional service contract for "just cause."

54. Due process requires that Petitioner inform Respondent of the grounds for the proposed adverse employment action. MacMillan v. Nassau Cnty. Sch. Bd., 629 So. 2d 226 (Fla. 1st DCA 1993). See Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005).

55. The Petition is long on what was violated--46 authoritative provisions--but short on a clear statement of what Respondent did and did not do to violate any or all of these provisions. On its face, the Petition clearly identifies three failures to act and three instances of influencing students'

recollections of important facts. With an assist from the opening statement, the allegation of "inappropriate language" focuses on Respondent's whispered utterance to Ms. Nova of the word, "shit." The Petition therefore identifies seven grounds for termination.

56. Aside from disregarding the omission of the three failures to act from the Prehearing Stipulation, given the difficulty of ferreting out the issues from Petitioner's pleadings, the Administrative Law Judge will not allow Petitioner to raise other issues, whether emerging from the hearing or Petitioner's construction of its own pleadings.

57. Two such issues emerged in Petitioner's opening statement. Petitioner cited Respondent's failure to write R. W. a referral, during or immediately after second period, and her failure to demand hall passes from the eighth-grade students who had brought R. W. into her classroom. Neither the Petition nor the Prehearing Stipulation mentioned these omissions as grounds for termination, and the Administrative Law Judge declines to treat these omissions as such grounds at this late stage.

58. It is not that the incident in Respondent's third-period classroom could not have supported allegations justifying Respondent's termination. On this record, Respondent's most egregious failure to act was during this incident. A subsidiary failure was not demanding hall passes, but the overarching failure was not securing R. W. until he could be escorted back to his

classroom by an adult. Respondent's duty toward R. W. was at its highest because of her supervisory authority over students physically present in her classroom. Her knowledge was at its most certain because Respondent had to know that the six eighth-grade boys had decided to deal with R. W. for the disrespect that he had shown Respondent earlier in the day, rather than merely ask him what was wrong. But this grave omission was never pleaded, and, in view of the confusion already caused by Petitioner's casual approach to pleading, raising this issue in opening statement was too little, too late.

59. Perhaps the most prominent of the unpled issues is whether Respondent dispatched the eighth-grade boys to deal with R. W. for the disrespect that he showed her earlier in the day, as distinct from asking D. S. to talk to him. There is no allegation--or evidence, besides R. W.'s claim--that she did so.

60. Petitioner's practice of pleading extraneous details contributes to the confusion of its pleadings as to this issue. Some of the pleaded irrelevancies are harmless, such as the passing of the media specialist in the hallway or the appearance of R. W.'s sister outside the restroom. But the pleading of Respondent's statements and question to R. W., while in her classroom, has the potential of causing serious confusion as to the issues.

61. The first statement and question allegedly uttered by Respondent to R. W. could have been treated as a confession that that Respondent had dispatched the eighth-grade boys to deal with R. W.--but, as noted above, Petitioner has not alleged this basis for termination. This statement and question could have been treated, on their face, exclusively as attempts to unduly embarrass R. W., without regard to the truth of the statement--but Petitioner did not identify this issue until the opening statement. (Tr. 17) Again, this is too little, too late.

62. Another unpled issue is Respondent's request that D. S. talk to R. W., which impermissibly assigned to a student a duty of a teacher or administrator. Although this request establishes Respondent's knowledge and duty to intervene later in the hallway, Petitioner's failure to cite the request itself as a ground for termination precludes its use for that purpose at this point.

63. As for the three alleged failures to act, Petitioner has proved what Respondent observed in the hall immediately before the hallway incident and that she failed to intervene. With the second and third failures, Petitioner proved that Respondent knew or reasonably should have known that D. S. and M. B. were proceeding to deal with R. W. for the disrespect that he had shown Respondent earlier and that Respondent had a heightened duty to intervene due to her role in creating the heightened risk to which R. W. was exposed of embarrassment, intimidation, or worse at the

hands of D. S. and the other eighth-grade boys. Compare McCain v. Fla. Power Corp., 593 So. 2d 500, 503 (Fla. 1992) (in a negligence context, "as the risk [created by a defendant] grows greater, so does the duty [that the defendant owes an injured party]"); Crislip v. Holland, 401 So. 2d 1115, 1117 (Fla. 4th DCA 1981) ("The extent of the defendant's duty is circumscribed by the scope of the anticipated risks to which the defendant exposes others.").

64. On these facts, Respondent's second and third failures to intervene with D. S. and M. B. violated the following Principles of Professional Conduct, Florida Administrative Code Rule 6A-10.081(3) (a) and (e), which provides that a teacher:

(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.

As violations of the Principles of Professional Conduct, these are also violations of School Board Policy 6.301(3) (b) (xxix).

65. Specifically, Respondent failed to make reasonable effort to protect R. W. from conditions harmful to learning or his mental or physical health or safety by failing to intervene when she saw D. S. and M. B. remove R. W. from this class and when she saw them walk across the hall and open the door of an occupied classroom. This failure arose, alternatively, from Respondent's

knowledge that she had asked D. S. to talk to R. W. or her heightened duty due to her role in exposing R. W. to greater risks when she asked D. S. to talk to him. The decision not to intervene, under these circumstances, intentionally exposed R. W. to unnecessary embarrassment.

66. Petitioner has also proved that Respondent influenced several student witnesses at lunch when she asked them leading questions about what they had seen or heard. This communication also violates rule 6A-10.081(3)(a) and (e) and School Board Policy 6.301(3)(b)(xxix).

67. Petitioner has failed to prove the first alleged failure to act, the first two alleged instances of influencing student witnesses, and the alleged inappropriate language.

68. School Board policy 6.301(3)(a) calls for progressive discipline. The parties have not addressed this issue. However, even if Respondent had no prior discipline, progressive discipline would not preclude termination due to the egregiousness of Respondent's failures to act. In her second failure to act, Respondent failed to prevent the students from discharging the duty that, assigned to them by Respondent, was exclusively that of Respondent and the administration. In her third failure to act, Respondent failed to prevent the student misconduct that was to follow. Given Respondent's role in creating the heightened risk of student misconduct, these two omissions are inexcusable.

RECOMMENDATION

It is

RECOMMENDED that Petitioner enter a final order finding Respondent guilty of the above-cited violations of the Principles of Professional Conduct and School Board policy and terminating her employment.

DONE AND ENTERED this 12th day of February, 2014, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of February, 2014.

COPIES FURNISHED:

Mark S. Wilensky, Esquire
Dubiner and Wilensky, LLC
Suite 103
1300 Corporate Center Way
Wellington, Florida 33414-8594

Leslie Jennings Beuttell, Esquire
Richeson and Coke, P.A.
Post Office Box 4048
Fort Pierce, Florida 34948

Dena Foman, Esquire
McLaughlin and Stern, LLP
Suite 1530
525 Okeechobee Boulevard
West Palm Beach, Florida 33401

Pam Stewart, Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Matthew Carson, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Michael Lannon, Superintendent
St. Lucie County School Board
4204 Okeechobee Road
Ft. Pierce, Florida 34947-5414

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.