STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. TONY BENNETT, AS
COMMISSIONER OF EDUCATION,

Petitioner,

vs. Case No. 13-3641PL

TERESA HENSON,

Respondent.
_____/

RECOMMENDED ORDER

On January 16, 2014, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings conducted a duly-noticed hearing pursuant to section 120.57(1), Florida Statutes, by video teleconference with sites in Panama City and Tallahassee, Florida.

APPEARANCES

For Petitioner: J. David Holder, Esquire
J. David Holder, P.A.
387 Lakeside Drive
DeFuniak Springs, Florida 32435

For Respondent: Emily Moore, Esquire
Florida Education Association
213 South Adams Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent violated section 1012.795(d) and (j), Florida Statutes (2011), or Florida

Administrative Code Rule 6A-10.081(3)(a) and (e), and if so, what penalty should be imposed by the Education Practices Commission.

PRELIMINARY STATEMENT

On April 22, 2013, Tony Bennett, in his capacity as Commissioner of Education (Petitioner or the Commissioner), filed an Administrative Complaint against Respondent, Teresa Henson, alleging violations of section 1012.795(1)(d) and (j) and rule 6A-10.081(3)(a) and (e). Respondent executed an Election of Rights form on June 5, 2013, requesting a hearing pursuant to section 120.57(1). On September 18, 2013, the matter was referred to the Division of Administrative Hearings for the assignment of an administrative law judge.

On September 26, 2013, a Notice of Hearing was issued scheduling the hearing for November 21, 2013. Two continuances were sought by Respondent and both were granted, with the hearing eventually rescheduled for January 16, 2014. The hearing commenced as scheduled on that date, and concluded the same day.

Joint Exhibits 1-7 were admitted into evidence. Petitioner presented the testimony of Nancy Davis, Jennifer Shea Saulmon, Patricia Lewis, Elizabeth Swedlund, Joseph Britt Smith, and Mike Jones, and Petitioner's Exhibits 1-6 were admitted into evidence. Respondent presented the testimony of Sharon Michalik, Glenda Nouskhajian, Holly Allain, and Tiffany Lewis Campos, and Respondent's Exhibits 1-3, 5-7, and 9 were admitted into

evidence. Respondent was given the opportunity to file Respondent's Exhibit 10 within seven days of the hearing; however, the exhibit was never filed.

The hearing Transcript was filed with the Division on February 4, 2014. Respondent's unopposed Motion for Extension of Time to File Proposed Recommended Orders was granted on February 6, 2014, and the deadline for filing post-hearing submissions was extended to February 24, 2014. Proposed Recommended Orders were timely filed by both parties and have been carefully considered in the preparation of this Recommended Order.

Petitioner withdrew the allegation contained in paragraph 3(d) of the Administrative Complaint. Accordingly, no findings of fact or conclusions of law will be made with respect to this allegation. All references to Florida Statutes are to the 2011 codification unless otherwise indicated.

FINDINGS OF FACT

1. Respondent is a teacher certified by the State of Florida, holding Florida Educator's Certificate 958493, covering the areas of Elementary Education, Exceptional Student Education (ESE), and Autism Spectrum Disorders, valid through June 30, 2014.

2. At all times material to the allegations in this case, Respondent was employed by the Bay County School District as an ESE teacher at Margaret K. Lewis Center (MKL Center).

3. This is a second career for Respondent. She left a business and technology career to pursue a career in education, specifically working with students with special needs. Respondent obtained her Master's degree and a special designation to work with special needs students. Respondent was motivated to pursue teaching special education students because she had an aunt with Down's syndrome who had limited educational opportunities.

4. Respondent taught at Oscar Patterson Elementary for the 2006-2007 school year, and then transferred to MKL Center beginning in the 2007-2008 school year.

5. After Respondent received her state educational certification in autism spectrum disorders, she requested to be assigned to teach an ESE class beginning with the 2010-2011 school year. That year, she was voted as "Teacher of the Year" by her peers.

6. The class to which Respondent was assigned was a challenging class. It was not unusual for students in this classroom to bite, kick, hit, pinch, and trip staff. During the 2010-2011 school year, the number of students was reduced from eight to four, and the number of paraprofessionals was increased

from two to three. During the 2011-2012 school year, there were four students in her classroom: C.B., J.B., K.M., and D.C. One paraprofessional, Patricia Lewis, was assigned specifically to D.C. The other two paraprofessionals, Jennifer Shea Saulmon and Nancy Davis, worked with all of the children, and when able to, Patricia Lewis did as well. Ms. Davis, Ms. Saulmon, and Ms. Lewis have seven, fourteen and twenty-seven years of experience, respectively.

7. C.B. had a severe mental disability with a limited ability to comprehend verbal communications and a limited ability to communicate. C.B.'s communication involved single words, sounds, and gestures. He could discern the speaker's mood, but might not fully understand the content of what was said. For example, C.B. might not understand that someone was saying hello, but would understand that the speaker was friendly towards him. C.B. also had problematic behaviors including biting, pinching, scratching, and hitting. C.B. had an awkward gait and wore ankle orthotics (AFO's), a type of plastic brace, over his shoe and lower leg to provide stability from the foot to the leg, and to assist in improving his ability to walk. C.B. was ten years old.

8. J.B. was approximately 11 years old in January 2012, and was diagnosed with Autism Spectrum Disorder. He also had a limited ability to communicate using single words, sounds and utterances, and gestures. J.B. also used an iPad to communicate.

Over time, someone working with J.B. would develop a greater ability to understand and communicate with him. J.B.'s difficult behaviors included spitting, hitting, kicking, and pinching.

9. K.M. was 11 in January 2012. K.M. was diagnosed with Down's syndrome, and had previously suffered a stroke which limited her use of one arm. She also had significant intellectual limitations. However, K.M.'s ability to communicate was greater than the other members of the class, and she could understand verbal communications. In addition, K.M. was more independent than her classmates, and was a risk for elopement from both the classroom and the campus. As stated by one of the paraprofessionals, K.M. "was a runner." By all accounts, K.M.'s behaviors were consistently disruptive, and managing her in a classroom took a significant effort.

10. D.C. was also 11 in January 2012. D.C. was diagnosed as autistic and engaged in repeated self-injurious behaviors. When upset, D.C. would repeatedly strike himself in the head and face, and he often wore a football helmet as a protective measure. D.C. was very strong, and attempts to prevent him from hurting himself could often result in staff members being hurt. There was testimony at hearing that his behavior plan addressed how many he times he was allowed to hit himself or how long he was allowed to hit himself without intervention. However, the behavior plan for D.C. was not in evidence. A portion of the

classroom was designed specifically for D.C., with padded walls and a padded floor, in light of D.C.'s tendency to hit his head against hard surfaces as well. He had some beads that he played with that sometimes calmed him.

11. At some point during the 2011-2012 school year, Respondent began to show signs that the stresses of her very challenging classroom were having an effect on her. After the Christmas break, her stress seemed to have intensified. Respondent was having trouble sleeping, suffered from high blood pressure and pain from injuries sustained in the classroom, and was experiencing some depression. Respondent began to "self-medicate" with alcohol at night. There was no credible evidence that Respondent ever drank during the day or was under the influence of alcohol during work hours.

12. At the end of the school day on January 30, 2012, Ms. Lewis approached assistant principal Elizabeth Swedlund to voice some concerns about Respondent's behavior in the classroom. Ms. Lewis related some events that had occurred in the classroom that day, as well as some general concerns regarding treatment of the students in the classroom. She voiced the following concerns: that Respondent took away D.C.'s beads and would allow him to hit himself for a period of time longer than allowed by his treatment plan; that she made statements to K.M. such as "I

could kill you" or "go play in the street"; and that she hit C.B. with a closed hand and kicked him while working in "circle time."

13. On January 31, 2012, Ms. Swedlund notified her principal, Britt Smith, of the conversation with Ms. Lewis. She decided to speak with the other paraprofessionals in the classroom and after doing so, to report the information to the abuse registry. Principal Smith notified Sharon Michalik, the District's Executive Director of Human Resources, of the issue with respect to Respondent. As a result, Mike Jones, Chief of Safety, initiated an investigation.

14. Mike Jones visited the campus the following day. All three paraprofessionals were interviewed and asked to provide written statements. He took Respondent for a drug and urine test, which came back negative. On Friday, February 3, 2012, Respondent was notified to meet with Ms. Michalik and other administrators to review the allegations. After this meeting, Respondent was suspended with pay, and the School District planned to proceed with a recommendation for termination. However, instead the parties entered an agreement executed on March 30, 2012, through which Respondent would take a medical leave of absence and would only be allowed to return to a position with the School District if she was found fit for duty. If she returned, she would be required to submit to random drug and alcohol testing.

15. On March 30, 2012, the Department of Children and Families issued a letter to Respondent stating that it found no indicators of physical injury and no indicators of bizarre punishment. On April 27, 2012, Respondent was evaluated by psychologist David J. Smith who opined that at that time, she was not fit for duty. She was re-evaluated on July 26, 2012, and cleared to return to work. At that time, she was assigned to a different school.

16. One of the issues raised by Ms. Lewis was that Respondent permitted D.C. to hit himself more frequently than allowed by his behavior plan. The Administrative Complaint specifically charges that she allowed D.C. to hit himself repeatedly for up to ten minutes, while his behavior plan indicated that he should be allowed to hit himself up to three times.

17. The behavior plan was not entered into evidence. The evidence was unclear as to what the plan actually required, and it was equally unclear exactly what Respondent was doing. For example, there was testimony that she would attempt to redirect him once he started hitting himself, but did not physically intervene for ten minutes. There was other testimony that there was never a time when he was allowed to simply hit himself with no one doing anything. Without being able to examine the behavior plan, and without being able to specify the exact

incident or incidents at issue, it is not possible to determine whether Respondent was varying from the requirements of the behavior plan, or if any variation was significant.

18. Ms. Davis reported to Ms. Swedlund that on or about Friday, January 27, 2012, J.B. was in time-out because of bad behaviors. While he was in time-out, he was sitting behind a rolling partition, and Respondent was holding the partition in place so that J.B. would have to remain in place. J.B. spat at Respondent, which is something he did often. Ms. Davis reported that while holding the partition Respondent spat back at him, an action that shocked Ms. Davis. Respondent denies ever spitting on J.B. She testified via deposition that J.B. was spitting while in time-out, and she was holding the barrier while talking to him. She responded to his behavior by saying "you do not spit." Respondent testified that it was possible that some spittle may have fallen on J.B., but that she never intentionally spit on him.

19. The only person who testified regarding the spitting was Ms. Davis. While she was a very credible witness, there was no testimony regarding how close she was to Ms. Henson or to J.B., or that J.B. reacted in any way. Neither of the other paraprofessionals in the room testified that they saw or heard about the incident, and it is implausible to think that such behavior would go without comment. It is conceivable that in

saying, "you do not spit," that spittle would result. Given the high burden of proof for this proceeding, the allegation has not been proven by clear and convincing evidence.

20. As previously stated, K.M. presented a classroom management problem. She had a tendency to run around the classroom, take her clothes off, or run out of the classroom and sometimes out of the building. She also would tear up items in the classroom and could be very disruptive. Ms. Lewis felt that Respondent had a hard time getting past her dislike of the child. She had heard her say things like, "I could just kill you right now," and "go ahead and go into the street." While Ms. Lewis believed K.M. could understand such statements, she did not react to them, except perhaps to run faster. Ms. Lewis did not believe that Ms. Henson was serious when she made the statements, but more likely made them when frustrated by K.M.'s behavior. Respondent did not recall ever making such statements.

21. Neither Ms. Lewis nor the Administrative Complaint identified exactly when Respondent was to have made these statements, although Ms. Lewis specified that they were statements made at different times. While Ms. Lewis testified that she believed Respondent did not like K.M., it is just as likely that she did not dislike the child, but was extremely frustrated by her behavior. All of the paraprofessionals testified that Respondent truly loved the children she worked

with, but that she was frustrated and overwhelmed in the very challenging classroom in which she taught. While the evidence was clear and convincing that Respondent made the statements, even Ms. Lewis testified that she did not believe Respondent was serious when she made them. Regardless, the statements were not appropriate statements to make to a child, especially a child with limited intellectual abilities that might not be able to discern whether Respondent was serious. They are, by their nature, disparaging statements.

22. Finally, the incident which caused Ms. Lewis to approach Ms. Swedlund about Respondent involved Respondent's reactions to C.B. C.B. liked to work on the computer. He would play computer games, such as Dora the Explorer, and was rewarded with computer time for good behavior and finishing all of his assigned work.

23. On Friday, January 27, 2012, C.B. had a rough day, and had been hitting, pinching, and kicking staff. Respondent had spoken with his mother about his behaviors to see if there had been any changes at home that might have contributed to his aggressive behavior. Respondent had told C.B.'s mother that they would have to try some different methods to get C.B. to comply, and that his playing on the computer all day would have to stop.

24. The paraprofessionals testified that on Monday, January 30, 2012, Respondent seemed agitated all day. One said

she seemed to carry the frustrations of Friday into Monday. That morning Jennifer Shea Saulmon went to the cafeteria to pick up C.B., who had walked from the parent pickup area without incident, and seemed to be in a good mood. When they reached the classroom, C.B. went straight to the computers. Respondent immediately told him that he could not have computer time.

25. Ms. Saulmon was upset by this, because C.B. had not misbehaved that morning. She questioned Ms. Henson's decision, and Respondent responded that he could not play on the computer all the time. He then completed his morning work without any disruption, and then walked over to the computers. Ms. Saulmon told him he could not play on the computer at that time.

26. At about 9:15 a.m., the class began "circle time." During this time, the students sit on the outside of a u-shaped table while Respondent sits on the inside of the "u." C.B. did not like circle time. On this particular day, he was sitting at the end of the u-shaped table, to Respondent's left. He began, as he often did, to hit and bite. According to Ms. Saulmon, this behavior usually subsides after about five minutes. This day, however, it did not. C.B. continued to pinch and hit Respondent.

27. In response, Respondent put her arm up with a closed hand (so that the child could not pull and bend back a finger) in a blocking motion, as the teachers and paraprofessionals had been taught to do in order to protect themselves. She said out loud,

"I'm blocking, I'm blocking." However, rather than simply holding her arm up to block against any blows, she would swing her arm toward him to stop the blow, and in doing so, made contact with his arm. Although to Ms. Davis it looked like Respondent was hitting him, she never thought Respondent was trying to hurt C.B. Each time Respondent blocked C.B., he pinched her again, and she blocked him again, which made him angrier. He then started kicking her, and Ms. Davis and Ms. Saulmon believed she kicked him back. However, neither paraprofessional could say that Respondent actually made contact with C.B. They were pretty certain that C.B. was kicking Respondent, and they could see movement toward him by Respondent, and C.B. responded angrily by squealing as he usually did when frustrated or angry. It is just as likely that Respondent was using her leg or foot to try to block C.B.'s kicks, as she stated in her deposition, and that C.B. was angry because she was blocking him.

28. Nonetheless, Respondent's clear agitation in the classroom that day led to Ms. Lewis' conversation with Ms. Swedlund about Respondent's behavior. While all of the paraprofessionals stated concerns about Ms. Henson's ability to handle that particular class, all were very supportive of her continuing to teach in the special education area. All three seemed to think that the environment of that particular class,

which by any measure would be extremely challenging, is one that overwhelmed Respondent, and that she had been in that setting too long.

29. When Respondent returned to work at the beginning of the 2012-2013 school year, she was transferred to Beach Elementary School. The principal at the new school is Glenda Nouskhajian.

30. Ms. Nouskhajian considers Respondent to be one of her lead teachers in the ESE department, and has no performance-related concerns about her. The only issue Respondent has had since coming to Beach Elementary was a minor paper-work issue related to transferring schools within the district. Respondent is not working in a stand-alone classroom like she was before. She is what Ms. Nouskhajian referred to as a "push-in," meaning that she goes into other teachers' classrooms and works with students in small groups in an inclusion setting. She works with the lowest quartile of students, and helps with all of these students' interventions. Ms. Nouskhajian testified that the students with whom Respondent works are making "great strides," and Respondent is an educator she would "absolutely" seek to retain.

31. Ms. Nouskhajian knew that there was an issue at Respondent's prior school, but did not investigate the details. She stated that Respondent had been placed at Beach Elementary by

Sharon Michalik, and "I knew that if she was a danger to students, Sharon Michalik would not have placed her at my school . . . . That she went through the counseling and everything she had to do so when she came to my school it was a total fresh start." Since coming to Beach Elementary, Respondent's evaluation for the 2012-2013 school year was overall effective, with all categories rated as effective or highly effective.

32. In sum, there is clear and convincing evidence that Respondent made inappropriate remarks to student K.M. There is not clear and convincing evidence that Respondent spat on J.B., or that she hit or kicked C.B. Likewise, there is not clear and convincing evidence that she varied significantly from D.C.'s behavioral plan or acted in a way that allowed him to hurt himself. There is clear and convincing evidence that Respondent was frustrated and overwhelmed in the autistic classroom and, despite having asked for the assignment, had been teaching in that environment for too long to be effective, given the violent tendencies of the children in that setting. There is clear and convincing evidence that she took a leave of absence in lieu of termination and could only return to the classroom after an evaluation found her fit for duty. A change of setting was needed and has served to re-invigorate Respondent.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1).

34. The Florida Education Practices Commission is the state agency charged with the certification and regulation of Florida educators pursuant to chapter 1012, Florida Statutes.

35. This is a proceeding in which Petitioner seeks to suspend Respondent's educator certification. Because disciplinary proceedings are considered to be penal in nature, Petitioner is required to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 291 (Fla. 1987).

36. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Florida Supreme Court, the standard:

> [e]ntails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

> 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 Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elect. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1991).

37. Section 1012.796 describes the disciplinary process for educators, and provides in pertinent part:

> (6) Upon the finding of probable cause, the commissioner shall file a formal complaint and prosecute the complaint pursuant to the provisions of chapter 120. An administrative law judge shall be assigned by the Division of Administrative Hearings of the Department of Management Services to hear the complaint if there are disputed issues of material fact. The administrative law judge shall make recommendations in accordance with the provisions of subsection (7) to the appropriate Education Practices Commission panel which shall conduct a formal review of such recommendations and

other pertinent information and issue a final order. The commission shall consult with its legal counsel prior to issuance of a final order.

(7) A panel of the commission shall enter a final order either dismissing the complaint or imposing one or more of the following penalties:
(a) Denial of an application for a teaching certificate or for an administrative or supervisory endorsement on a teaching certificate. The denial may provide that the applicant may not reapply for certification, and that the department may refuse to consider that applicant's application, for a specified period of time or permanently.
(b) Revocation or suspension of a certificate.
(c) Imposition of an administrative fine not to exceed $2,000 for each count or separate offense.
(d) Placement of the teacher, administrator, or supervisor on probation for a period of time and subject to such conditions as the commission may specify, including requiring the certified teacher, administrator, or supervisor to complete additional appropriate college courses or work with another certified educator, with the administrative costs of monitoring the probation assessed to the educator placed on probation. An educator who has been placed on probation shall, at a minimum:
1. Immediately notify the investigative office in the Department of Education upon employment or termination of employment in the state in any public or private position requiring a Florida educator's certificate.
2. Have his or her immediate supervisor submit annual performance reports to the investigative office in the Department of Education.
3. Pay to the commission within the first 6 months of each probation year the

administrative costs of monitoring probation assessed to the educator.
4. Violate no law and shall fully comply with all district school board policies, school rules, and State Board of Education rules.
5. Satisfactorily perform his or her assigned duties in a competent, professional manner.
6. Bear all costs of complying with the terms of a final order entered by the commission.
(e) Restriction of the authorized scope of practice of the teacher, administrator, or supervisor.
(f) Reprimand of the teacher, administrator, or supervisor in writing, with a copy to be placed in the certification file of such person.
(g) Imposition of an administrative sanction, upon a person whose teaching certificate has expired, for an act or acts committed while that person possessed a teaching certificate or an expired certificate subject to late renewal, which sanction bars that person from applying for a new certificate for a period of 10 years or less, or permanently.
(h) Refer the teacher, administrator, or supervisor to the recovery network program provided in s. 1012.798 under such terms and conditions as the commission may specify.

38. Charges in a disciplinary proceeding must be strictly construed, with any ambiguity construed in favor of the licensee. Elmariah v. Dep't of Prof. Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof. Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Disciplinary statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden their application. Beckett v. Dep't of

Fin. Servs., 982 So. 2d 94, 99-100 (Fla. 1st DCA 2008); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

39. The Administrative Complaint alleges the following factual bases for imposing discipline against Respondent:

> 3. During the 2011/2012 school year Respondent inappropriately disciplined students in her Exceptional Student Education (ESE) class as evidenced by the following:
>
> (a) On or about January 27, 2012, J.B. an eleven-year-old ESE Student, spit in Respondent's face and Respondent reacted by spitting in the student's face.
>
> (b) On or about January 30, 2012, C.B., a ten-year-old male ESE student, pinched, hit, and kicked Respondent and Respondent kicked C.B. and hit him with a closed hand.
>
> (c) During the 2011/2012 school year, Respondent told K.M. "I could just kill you" and "you know I just want to kill you right now" or words to that effect.
>
> * * *
>
> (e) During the 2011/2012 school year, Respondent allowed D.C. an eleven-year-old male ESE student, to hit himself repeatedly for up to ten minutes, contrary to his behavior plan which indicated D.C. should be allowed to hit himself up to three times.
>
> 4. On or about April 6, 2012, Respondent entered into an agreement with the Bay County School District whereby Respondent would take a medical leave of absence and submit to a fitness for duty evaluation. The results of Respondent's evaluation were that she was unfit for duty at that time.

40. The Department has proven the allegations in paragraphs 3(c) and 4 of the Administrative Complaint by clear and convincing evidence. With respect to the other allegations, there are other, equally plausible explanations of what happened in the classroom that render the evidence less than clear and convincing.

41. The Administrative Complaint alleges in Counts 1 and 2 that Respondent violated sections 1012.795(1)(d) and (j), which state:

> (1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for up to 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for up to 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon an order of the court or notice by the Department of Revenue relating to the payment of child support; or may impose any other penalty provided by law, if the person:

* * *

> (d) Has been guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education.

* * *

> (j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

42. With respect to Count 1, section 1012.795(1)(d) requires a finding that Respondent has been guilty of gross immorality or an act involving moral turpitude "as defined by rule of the State Board of Education." (emphasis added).

43. The Ethics in Education Act, chapter 2008-108, section 32, Laws of Florida, amended section 1012.795(1)(d) to add the phrase "as defined by rule of the State Board of Education," creating the statute as it presently appears.

44. Judge F. Scott Boyd analyzed the effect of the 2008 legislative amendment in Arroyo v. Smith, Case No. 11-2799, ¶ 109 (Fla. DOAH May 31, 2012; Fla. EPC Nov. 13, 2012), as follows:

> The Ethics in Education Act, Chapter 2008-108, Laws of Florida, added the phrase "as defined by rule of the State Board of Education" to what now appears as section 1012.795(1)(d). It is unclear whether this new language modifies only "an act involving moral turpitude" or if it instead modifies the entire phrase "gross immorality or an act involving moral turpitude." The absence of a comma after the word "immorality" suggests that it modifies the entire phrase.

> In any event, when construing penal statutes, any statutory ambiguity should be resolved in favor of [the Respondent] . . . . This portion of the statute is thus only violated if an educator is guilty of gross immorality as defined by rule of the State Board of Education.

45. The Final Order in Arroyo v. Smith considered the Recommended Order and it was "adopted in full and becomes the Final Order of the Education Practices Commission." The Final Order in Arroyo and the conclusions of Judge Boyd adopted in that Final Order must be applied here as well.

46. As noted by Judge Boyd, "[t]he State Board of Education has not defined the term 'gross immorality' by rule." Arroyo v. Smith, at ¶ 110.

47. Petitioner does not address the failure to define gross immorality by rule, instead relying on cases construing the term that were decided prior to the 2008 legislative amendment to section 1012.795(1)(d). Given the amendment, those cases are inapplicable to the current standard established by the Legislature.

48. Rule 6A-5.056 defines the terms "immorality" (not gross immorality) and "moral turpitude." Because the acts alleged in the Administrative Complaint occurred before the most recent amendment to rule 6A-5.056, the conduct proven must be measured against the rule as it existed at the time of the offenses.

Childers v. Dep't of Envtl. Prot., 696 So. 2d 962, 964 (Fla. 1st DCA 1997).

49. Prior to its 2012 amendment, rule 6A-5.056(6) defined "moral turpitude" as "a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude." Moral turpitude has also been defined by the Supreme Court in a similar fashion. See State ex rel. Tullidge v. Hollingsworth, 108 Fla. 607, 611, 146 So. 660, 661 (1933).

50. The only factual allegations proven by Petitioner are that Respondent made inappropriate comments to student K.M.; that she entered into an agreement with the School District to take a leave of absence; and that her first fitness for duty evaluation indicated that at that time, she was not fit to return to duty. While there was evidence presented in support of the other allegations, it was not of the weight so as to "produce[] 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." Slomowitz v. Walker, 429 So. 2d at 800. Given this limited factual basis, Petitioner did not prove a violation of section 1012.795(1)(d).

51. Count 2 is not truly a separate count, but lays a statutory predicate for violations of rule 6A-10.081(3)(a) and (e).

52. Counts 3 and 4 allege violations of Florida Administrative Code Rule 6A-10.081(3)(a) and (e), which provides:

> (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.

53. Based upon the facts proven, Petitioner has not proven the violation alleged in Count 3, but has proven the violation alleged in Count 4 by clear and convincing evidence.

54. Disciplinary guidelines for the imposition of penalties against educators are found in rule 6B-11.007. There does not appear to be a specific guideline for a violation of rule 6A-10.081(3)(e), for conduct such as that alleged in this case. In fact, the rule still refers to rule 6B-1.006 and does not reference 6A-10.081 at all. However, a "catchall" provision for "other violations of the Principles of Professional Conduct and the Florida Administrative Code" gives a range from probation to revocation. Fla. Admin. Code R. 6B-11.007(2)(i)22.

55. Consideration has been given to the conduct actually proven, the statements of the paraprofessionals with whom the Respondent worked, and the testimony of her principal at the school where she currently teaches. All of the paraprofessionals with whom Respondent worked emphasized that she is a good teacher who needed help, not discipline. As stated by Ms. Davis in her February 29, 2012, statement, "My point is that in my opinion this is not a teacher that needs to lose her job! She needs a break in a classroom with less violence on a daily/hourly basis . . . . I invite anyone who sits on this committee to come spend a day with us in our room before you render a decision on this teacher who needs some understanding and help, not a termination notice."

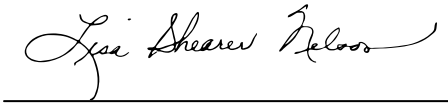
56. According to Ms. Nouskhajian, Respondent is flourishing in a new environment. Those who have worked with her closely have concluded that not allowing her to teach would be a loss to the teaching profession. By the same token, safeguards need to be in place to make sure she continues to flourish.

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 that Respondent has violated rule 6A-10.081(3)(e). It is further recommended that Respondent be reprimanded and placed on probation for a period of two years,

subject to such terms and conditions as the Commission in its discretion may impose.

DONE AND ENTERED this 24th day of March, 2014, in Tallahassee, Leon County, Florida.



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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.