STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 14-0687TTS

ELVIA HERNANDEZ,

Respondent.
_____/

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing on May 2, 2014, by videoconference in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Cristina Rivera Correa, Esquire
The School Board of Miami-Dade County, Florida
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
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STATEMENT OF THE ISSUE

The issue in this case is whether, pursuant to section 1012.33(1)(a), Florida Statutes (2013), Petitioner has

just cause to dismiss Respondent for the violations alleged in the Notice of Specific Charges served on April 22, 2014.

PRELIMINARY STATEMENT

By Notice of Specific Charges, Petitioner alleged that Respondent was employed under a professional service contract as a teacher of a special education kindergarten class. On October 2, 2013, ** was among the special education students in Respondent's class.

While sitting on the floor with her class as part of instruction, Respondent allegedly held ** with one hand and, with her other hand, struck him four times on the child's forearm and thigh, causing the child to cry. The striking and crying allegedly took place in view of **'s classmates.

Count I alleges that Respondent committed misconduct in office, in violation of Florida Administrative Code Rule 6A-5.056(2)(c), by violating Respondent's policies. Specifically, Respondent allegedly violated policy 3210.7, which prohibits intentionally exposing a student to unnecessary embarrassment or disparagement, and policy 3210.21, which prohibits unseemly conduct in the workplace. Count II alleges that Respondent committed misconduct in office, in violation of rule 6A-5.056(2)(e), by engaging in behavior that reduces the teacher's ability to effectively perform her duties. Count I

alleges that, after the incident, Respondent's principal no longer trusted Respondent to teach and supervise students.

Count II is materially the same as Count I.

Count III alleges that Respondent failed to treat all persons with respect and make the students' well-being a core guiding principle, in violation of policy 3210.01.

A second Count III alleges that Respondent violated policy 5630, which prohibits the use of corporal punishment and limits the use of "reasonable force" to, among other things, self-defense and the protection of persons or property.

By letter dated February 13, 2014, Petitioner's Administrative Director advised Respondent that the school board determined at its meeting of February 12, 2014, to suspend Respondent without pay and initiate a dismissal proceeding. The letter provided Respondent with 15 days within which to request a hearing.

Respondent timely requested a hearing.

At the hearing, Petitioner called three witnesses and offered into evidence 12 exhibits: Petitioner Exhibits 1-7 and 12-16. Respondent called one witness and offered into evidence no exhibits. All exhibits were admitted except Petitioner Exhibits 12-15, which were proffered.

The court reporter filed the Transcript on June 13, 2014. The parties filed proposed recommended orders on June 30, 2014.

FINDINGS OF FACT

1. Petitioner has employed Respondent as a teacher since 2007. Until this incident, Respondent has not previously received any adverse employment action during her teaching career, which has been exclusively with Petitioner.

2. Initially, Respondent worked as a first-grade general education teacher at Liberty City Elementary School. For her second year at Liberty City, Petitioner assigned Respondent to teach a pre-kindergarten special education class, which contained 12-14 students. Four students were general education students, and the remaining students received special education under a variety of eligibilities. Petitioner assigned Respondent a mentor, and Respondent later earned a certificate in special education.

3. Respondent taught special education classes at Liberty City for the next four school years through June 2013. The special education program, of which Respondent was a part, was transferred from Liberty City to Crowder Early Childhood Diagnostic and Special Education Center (Crowder) for the 2013-14 school year.

4. ** was not among Respondent's students at the start of the 2013-14 school year. About three weeks after the school year started, ** transferred into Respondent's classroom. **'s individual education plan states that its eligibilities are

Autism and Emotional/Behavioral Disorder. **'s behavior was volatile in class, and ** would scream and throw itself onto the floor when it did not get its way. To avoid lunchroom disruptions, shortly after **'s arrival, Respondent obtained the approval of her principal to eat lunch in the classroom with ** and another student who did not tolerate the lunchroom well.

5. On October 2, 2014, 12 students were in Respondent's class. Four students were general education students, and the remaining students were special education students. A paraprofessional assisted Respondent from 8:30 a.m. to 11:30 a.m. each day, including the day in question.

6. Before lunch, Respondent was teaching reading with the students seated on the floor in a circle. Respondent's class occupied a large pod, which was divided into two classrooms by shelves, not a door. On the other side of the shelves was an Autism Spectrum Disorder class. Respondent's side of the pod contained small tables and easels, an art area, a long table, and a puppet theater that doubled as a safe place for students needing a time-out.

7. Relative to the front door leading to the hallway, Respondent and her students were at the far end of the classroom, which Respondent estimated to be at least 20-23 feet from the door leading to the hallway. At some point, ** tried to situate itself next to ##, who generally kept to itself and tried to move

away from **. Respondent intervened by telling ** to sit next to her. ** instead threw itself down on the floor in close proximity to the rear wall of the classroom and began flailing about. Fearing that ** would injure itself, Respondent kneeled beside ** and secured its hands. In a few moments, ** calmed down, and Respondent was able to resume instruction.

8. Given these facts as a hypothetical, the principal testified that a teacher taking these actions would not violate any of Petitioner's policies.

9. Following the incident, nothing appeared out of the ordinary. As was her custom, Respondent had lunch with ** and the other child in the classroom. After lunch, ** was removed from the class, and Respondent was summoned to the office where the principal, in the presence of a law enforcement officer, informed Respondent that she had been observed striking **.

10. Unknown to Respondent, as she was holding **'s hands down, the secretary/treasurer of Crowder, who had been a classroom teacher, had entered the front door of the classroom to give Respondent some papers that Respondent needed to sign. The secretary/treasurer testified that, over the course of "a couple of seconds," she saw Respondent kneeling beside **, holding it down with her left hand, and striking it with the other hand on its forearm and sides. With each strike, according to the

secretary/treasurer, Respondent raised her right hand to shoulder height before striking the crying child, who was not struggling.

11. The most immediate problem with the secretary/treasurer's version of events is her claim that she had an unobstructed view of the incident. This claim is untrue. The other students, who were seated in a circle at the far end of the room, were between the secretary/treasurer and Respondent and **.

12. More importantly, the secretary/treasurer's version of events does not make sense given her muted reaction. Seeing a teacher striking a passive, crying child hard four times, the secretary/treasurer did not intervene to halt this child abuse. Nor did she immediately return to the office to inform the principal or call the police. Instead, by her own testimony, she exited the classroom, proceeded to a nearby classroom where she delivered to another teacher a paper that needed to be signed, and returned to the front office about four minutes after the incident had taken place.

13. Once in the office, the secretary/treasurer still did not immediately report the incident as she described it in her testimony. Instead, she suggested that the principal conduct a teachers' meeting to remind the teachers of approved methods of discipline. When the principal asked why she should do so, the secretary/treasurer recounted the version to which she testified.

14. The improbabilities and implausibilities in the testimony of the secretary/treasurer preclude assigning it any weight. The striking of any student is unequivocally prohibited by Petitioner's policies. The striking of a very young student with special education disabilities that would be associated with disruptive behaviors would represent a more egregious violation of these policies. The actions of the secretary/treasurer after the incident are inexplicable--unless, at the time, she was unsure of exactly what she had seen or knew that she had seen an incident more in line with Respondent's description.

15. Further undermining the testimony of the secretary/treasurer concerning the incident, which involved four blows of the hand swung from shoulder height, ** was examined later on the same day and bore no marks.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1012.33(6)(a)2., Fla. Stat. (2013).

17. Petitioner may terminate or suspend a teacher for just cause, which includes misconduct in office. § 1012.33(1)(a). Petitioner bears the burden of proving the material allegations by a preponderance of the evidence. See, e.g., Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

18. Petitioner pleaded this case on the alternative grounds of corporal punishment or unreasonable force to protect a student

from injuring himself. However, Petitioner has failed to prove either of these theories. Instead, the facts demonstrate only that, entirely consistent with Petitioner's policies, Respondent reasonably restrained ** during a tantrum for a few seconds to prevent the child from injuring itself. On these facts, just cause does not exist for taking adverse employment action against Petitioner.

19. Section 1012.33(6)(a) provides that, if the charges are not sustained, the school board shall immediately reinstate the teacher and pay her "back salary." It is not clear from the record whether Respondent has been suspended without pay pending the resolution of this case.

RECOMMENDATION

It is

RECOMMENDED that The School Board of Miami-Dade County, Florida, enter a final order dismissing the Notice of Specific Charges and, if Respondent has been suspended without pay, reinstating her immediately with back pay.

DONE AND ENTERED this 22nd day of July, 2014, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 2014.

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.