

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 14-2999TTS

SHAWNA DRIGGERS,

Respondent.

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RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing on October 14 and 15, 2014, in Fort Myers, Florida.

APPEARANCES

For Petitioner: Robert Dodig, Jr., Esquire
School District of Lee County
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Fort Myers, Florida 33966-1012

For Respondent: Robert J. Coleman, Esquire
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STATEMENT OF THE ISSUES

The issues are whether Respondent is guilty of misconduct in office, as alleged in the Petition for Termination dated May 19, 2014, and if so, whether termination of her employment is an appropriate sanction.

PRELIMINARY STATEMENT

After conducting an investigation of allegations of misconduct by Respondent, a Pre-Kindergarten/Exceptional Student Education (Pre-K/ESE) teacher at Caloosa Elementary School (Caloosa), and determining that probable cause for disciplinary action existed, the Lee County School Board (Board) issued a Petition for Termination proposing to terminate her employment for misconduct in office as defined in Florida Administrative Code Rule 6A-5.056, including a violation of School Board Policies 5.02 (Professional Standards) and 5.29 (Complaints Related to Teachers). Respondent timely requested a hearing, and the matter was referred by the Board to DOAH with a request that a formal hearing be conducted.

At hearing, Petitioner presented the testimony of nine witnesses and offered Petitioner's Exhibits 1-7, 8 (except page 5), 9, 10, 11 (except paragraphs 2 and 3 on page 3), 12, 15-20, 22, and 23, which were accepted in evidence. Respondent testified on her own behalf and offered Respondent's Exhibits 1-7 and 9-11. All were received except Exhibit 5, on which a ruling was reserved. Exhibit 5 is accepted in evidence.

A four-volume Transcript of the hearing has been prepared. On December 12, 2014, Proposed Recommended Orders (PROs) were filed by the parties, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties and the Charges

1. Petitioner is responsible for hiring, overseeing, and terminating employees in the school district.

2. Respondent is an instructional employee who received a bachelor's degree in special education in 2007 from Florida Gulf Coast University. She is certified to teach (a) special education kindergarten (K) through grade 12; (b) pre-K through grade three; (c) English to speakers of other languages; and (d) general education K through grade six. Also, she has completed three of four masters level courses in autism required to obtain her Autism Endorsement. On October 1, 2010, Respondent acquired her professional services contract.

3. As an instructional employee, Respondent's employment is governed by the Collective Bargaining Agreement between the Board and the Teacher's Association for Lee County (TALC). In order to terminate an employee under the TALC contract, just cause is required.

4. The incident which gave rise to this proceeding took place on December 12, 2013, at which time the Board alleges Respondent improperly restrained a special education student in her classroom. Several months later, after the parents of two other students in her classroom learned about the incident, they came forward and, for the first time, expressed concerns about

behavioral issues with their children and physical injuries (bruises on the legs and a scratch mark) that they attributed to Respondent. (A third parent also telephoned the school but did not wish to file a complaint.) The parents' complaints triggered the Board's proposed action.

5. In a Petition for Termination dated May 19, 2014, the Board alleged that just cause exists for terminating Respondent for the following acts of misconduct while teaching a special education class at Caloosa during school year 2012-2013 and the fall of school year 2013-2014:

a) She improperly restrained a student in her classroom on December 12, 2013;

b) She exhibited "a pattern of inadequate classroom supervision and academic focus prior to that incident";

c) She yelled at students and was relentless when a student refused to perform a task;

d) She was observed by a colleague attempting to force feed a student;

e) She told a student, "I'm bigger than you, I will win";

f) The school received complaints from the parents of two children that they noticed an escalation of negative behavior in their children while they were students in her classroom;

g) One of the two parents alleged that her child's behavior immediately improved after the child was withdrawn from the school in February 2014; and

h) The second parent alleged that her child would come home from school with bruises on his legs; that his speech and behavior immediately improved after Respondent left school; and that the child had significant diaper rash and full diapers on several occasions when he arrived at his after-school provider.

6. Respondent does not dispute the allegation that she told a student "I'm bigger than you, I will win." Even so, the undersigned has assigned that statement little, if any, weight in resolving this dispute.

B. Respondent's Employment Prior to School Year 2012-2013

7. In the spring of 2007 Respondent completed her paid internship with the Board as a student teacher. In August 2007 she was hired by Caloosa on an annual contract teaching intensive academics to students with learning disabilities in grades K through two.

8. At the end of her first year of teaching, Respondent received a performance assessment of high performing and/or satisfactory in all categories. Shelley Markgraf, her evaluator and then the assistant principal of Caloosa, noted that Respondent had a "rough start" but ended the year "with a strong

finish" and that Markgraf was "very proud" of her accomplishments. Pet'r Ex. 7, p. 73.

9. Respondent's contract at Caloosa was not renewed at the end of the year. There is no evidence, however, that the non-renewal was due to poor performance. In school year 2008-2009, she was hired by Veterans Park Academy for the Arts (VPA), another District school, where she continued teaching for the next four years. During that four-year period, she taught K, first, and second grade special education students with autism. All were low-functioning students who were not capable of receiving a regular diploma when they finished high school. She was rated as satisfactory or effective for each of those years.

C. School Year 2012-2013

10. Respondent elected to return to Caloosa for the 2012-2013 school year, primarily because Caloosa was located closer to her home. By then, Markgraf was principal, and even though Markgraf had misgivings about hiring Respondent, she was hired because of a lack of applicants qualified to teach ESE students.

11. Respondent was assigned to teach a small pre-K social communications class with less than ten autism students. The students were three to five years of age, on the autism spectrum, and many were behaviorally challenged, easily frustrated, and had social communication deficiencies.

12. During most of the year, Respondent's paraprofessional (helping teacher) was Sara Catalano. It is fair to say that the working relationship between the two was not good. Catalano eventually left Respondent's classroom before the end of the school year because she felt she could not continue to work with Respondent. According to Catalano, Respondent did not prepare for class, her continual "scrambling" at the last minute to get activities prepared created a very "stressful" environment, and Catalano felt her efforts could be better served in another classroom. Respondent attributes her preparation deficiencies to the fact that Caloosa used a set teaching curriculum for exceptional students, which had not been used at VPA, and it took time and effort to adapt to the new requirements.

13. On October 10, 2012, Caloosa's Behavioral Specialist, Crystal Dormer, wrote a memorandum to the administration regarding various things she had observed when she visited Respondent's classroom four or five times a week. See Pet'r Ex. 11. As further explained by Dormer at hearing, many times she found Respondent in the bathroom and not supervising the students. She estimated that Respondent went to the bathroom approximately ten to 15 times per day and spent up to 12 minutes in there each time. She characterized Respondent as having controlling behavior, relentless in forcing a student to complete a task, and lacking in patience, as evidenced by her

yelling at the students. On one occasion, Dormer observed Respondent attempting to force feed a student who brought his own lunch from home and refused to try the school food. Finally, she was concerned with Respondent's "sporadic mood swings" when she would be calm and pleasant with the students and then suddenly begin yelling at them.

14. On October 12, 2012, Respondent was issued a Letter of Concern by Markgraf regarding "the many concerns various people have had that have come in and out of [her] room." Pet'r Ex.

16. These concerns included "screaming" at students (which was heard by teachers and other personnel passing by the classroom), failing to supervise her students, using her cellphone "all the time" during class for personal calls (most of which were made to her husband in a loud and argumentative tone), being easily frustrated with other teachers, and having a lack of patience with the students. School policy is for teachers to have their cell phones turned off during the day and used only for emergencies. Finally, two teacher aides asked to be removed from her classroom because "they were uncomfortable with the way things were going."

15. In the Letter of Concern, which addressed only some of the complaints received by Markgraf, Respondent was specifically instructed to not have her cell phone out when supervising students; supervise her classroom at all times; treat students

with respect; not attempt to force students to try the school lunch if they brought a lunch from home; and focus on school issues rather than personal issues at home. Pet'r Ex. 16. Respondent did not deny the allegations or protest receiving the Letter of Concern.

16. On April 8, 2013, Respondent received a Letter of Reprimand for Unsatisfactory Performance for sleeping during "naptime" at her desk. Pet'r Ex. 17. The incident was first reported by Catalano who, after knocking on the door, entered the classroom to obtain supplies (pencils) and noticed that for around four minutes, Respondent sat at her desk with her head lowered and did not raise her head or otherwise acknowledge her presence. The assistant principal, Diana Lowrey, then went to the classroom and observed Respondent with her head down and appearing to be asleep. Although Respondent contended that she was not sleeping but was holding her head down while waiting for a pain reliever to start relieving a migraine headache, this explanation was not accepted. The Letter of Reprimand directed Respondent to remain awake and alert during all supervisory time periods or call somebody to cover her classroom. The Letter indicated that she had violated School Board Policy 4.01 regarding student safety.

17. The performance evaluation for school year 2012-2013 had a rating scale that included, from best to worst, Exemplary,

Accomplished, Basic, and Requires Action. Basic means you need improvement, while Requires Action means something is drastically not right. In the 20 areas evaluated for Respondent that school year, Respondent received one Exemplary (Communicating With Families). According to Markgraf, "parents loved her" because she was "very good at communicating" with them. She also received nine Accomplished, nine Basics, and one Requires Action. See Pet'r Ex. 7. The Requires Action was in the area of Establishes and Manages Classroom Procedures. Id. Markgraf testified that she wanted Respondent to "improve on classroom supervision" and "to improve on the way she spoke to and treated kids, and her peers."

18. In her written comments, Markgraf noted that "[w]hile she had done some great things in her classroom and with her peers, there are some things I would like to see improved for next year." Pet'r Ex. 7, p. 51. Markgraf went on to say that there "have been a couple of instances where supervision has not been optimal in the classroom, this needs to improve to 100%. On days when Shawna is not 100%, she has frustration problems with students and is not always respectful to them, and is not always prepared." Id. The evaluation concluded that "Shawna has done everything I've asked of her this year and I look forward to a very successful next year." Id.

D. School Year 2013-2014

19. Respondent returned to Caloosa for school year 2013-2014. Although she was still one course short of obtaining her Autism Endorsement, she was again assigned to teach pre-K autistic students. The class began with four students but by October 2013 had increased to eight. Most of the students were new to a school environment, their academic levels were much lower than the students she had the year before, and they were either nonverbal or had very limited verbal communication. In short, they were a far more challenging group to manage than the students she taught the previous year.

20. Respondent's paraprofessional was Andrea Schafer. A second paraprofessional, Deborah Wagner, spent approximately 90 minutes per day in the classroom after the classroom size reached eight students. At the beginning of the school year, Markgraf instructed Schafer to immediately inform her of any concerns regarding Respondent's conduct or classroom management.

21. Until December 2013, Schafer did not report any concerns to Markgraf. Undoubtedly, as Markgraf suggested, this was because "teachers and staff don't like to tell on each other," but wait until "things have spiraled out of control." When Schafer concluded that things were going "downhill," she spoke with Markgraf on December 6, 2013. She reported that Respondent was engaged in "troubling behavior," and that she was

spending "more and more time in the bathroom" and "more time on her phone" texting messages, mainly to her husband. Also, Schafer reported that Respondent would allow the students to just sit in front of the "You Tube videos" for academic lessons, rather than presenting live instruction. While this took place, Respondent would go to the restroom, presumably to use her cell phone, leaving Schafer to manage the classroom.

22. With Markgraf's approval, Schafer began keeping detailed notes on index cards regarding Respondent's performance. See Pet'r Ex. 9. As it turned out, Respondent was suspended a few days later so notes were only recorded for Respondent's activities on December 9, 10, and 11, 2013. They reflect, among other things, that Respondent continued to remain in the bathroom for long periods of time (up to 19 minutes), and she was using her cell phone for personal calls. The notes also reflect that student D.M. was very non-compliant and disruptive, that Respondent had difficulty managing him, and that D.M.'s father met with Respondent in the classroom on December 10, 2013.

23. The other paraprofessional, Wagner, confirmed that after she was assigned to the classroom in October, she observed Respondent spending "a lot" of time in the bathroom, especially when the children were eating, and that she would put her cell phone away when leaving the bathroom. This led Wagner to

conclude that Respondent was using her cell phone while in the bathroom.

E. The December 12, 2013 Incident

24. One of Respondent's students was D.M., then four years old, who had transferred to Caloosa in October 2013 from a school in New York City. According to Markgraf, D.M. "was a big kid, and he was violent when he went off, and it wasn't a secret in school." Dormer described him as "aggressive, noncompliant, and disruptive," and that he would "hit, throw things, scream, pinch, [and] bite on occasion." She testified that D.M. was one of two out of 35 autistic students that year that caused her the most problems. Wagner testified that D.M. "had more frequent temper tantrums" than other students and that if you asked D.M. to do anything, he would start crying. Schafer agreed with Wagner's assessment and noted that Dormer had to be called a number of times to remove him from class. At hearing, D.M.'s mother testified (through an interpreter) that as a disciplinary measure at home, her husband would take off his belt and show it to D.M. whenever he misbehaved, but she denied that he ever used it when punishing the child. However, on a visit to Respondent's classroom on December 10, 2013, the father took off his belt and offered to give it to Respondent to use on his son if a disciplinary problem arose. In sum, the evidence shows

that D.M. was probably the most difficult autistic child in the school to manage and teach.

25. The incident in question began on the morning of December 12, 2013, after Respondent attempted to have D.M. perform a counting exercise from one to 100. Completing the exercise was necessary before the Christmas break in order for a new Individualized Education Program (IEP) to be prepared for D.M. His current IEP had been prepared in New York and needed to be revised to conform to Florida requirements. Rather than count, D.M. wanted to play on the computer, his favorite activity. At that point he became combative and disruptive.

26. While changing the diapers of a student in the bathroom that adjoins the classroom, Schafer heard yelling in the classroom. When she entered the classroom, she observed D.M. sitting in a chair in front of a table in the back of the room with Respondent standing behind him. D.M. was "very upset and very aggressive" and swinging his arms in an effort to free himself. Schafer stated that Respondent had her hand on the back of D.M.'s neck and was attempting to push his head onto the table in front of him. Respondent says she was simply trying to keep the child seated until the counting exercise was completed.

27. Schafer also observed Respondent holding D.M.'s fingers and pushing them into his wrist in an effort to restrain him from hitting her. When D.M. attempted to bite Respondent,

she raised his arm towards his mouth to prevent this. While this was occurring, D.M. was complaining that it hurt and was crying. At one point, Respondent held D.M.'s arms behind his back.

28. Schafer asked Respondent if the behavioral specialist should be called to the classroom. She asked because on prior occasions when D.M. was having a "temper tantrum" or refusing to comply with instructions, Dormer, who "helps out when a student is in crisis," had been called to the classroom to assist Respondent. Respondent replied that this was not necessary.

29. Wagner was present for a part of the incident. She walked into the classroom and observed Respondent standing behind D.M., who was crying and seated in a chair in front of a table. Respondent's hand was on D.M.'s neck pushing his head toward the table. Respondent asked Wagner to stand behind D.M. and hold him while she temporarily left the area to pick up items needed for the other students. Although she did not see Respondent take D.M.'s hands and push his wrists down, she stated that Respondent had done this on a few other occasions whenever a student attempted to bite her.

30. Schafer says the incident was over "pretty quick," and after continual prompting by Respondent, D.M. completed most or all of the counting exercise and was allowed to go to a

computer. The student did not suffer any physical injuries during the incident.

31. Schafer did not immediately report the incident, as she was unsure if the techniques being used by Respondent were appropriate, and she did not want to get Respondent in trouble if they were allowed. During lunch hour, she checked with Wagner to see if Respondent's actions may have been authorized. Wagner was not trained in that area and was unsure. After lunch, Schafer discussed the incident with Dormer, who then reported the matter to Markgraf.

32. Respondent testified that her method of restraining D.M. was a safe and effective way to restrain him while he was out of control and was consistent with her training at VPA. She explained that when a special education student resorted to bad behavior as a tactic for not completing a task, she was trained to complete a "work through," which essentially requires the student to finish the task regardless of their behavior. However, this assertion was not corroborated by any personnel from VPA. She also stated that the restraint was consistent with training she had received for her Techniques for Effective Adolescent and Child Handling (TEACH) certification. However, her certification had lapsed, she had not received current training in order to become recertified, and her understanding differed from Dormer's interpretation of TEACH.

33. According to Dormer, who instructs the TEACH certification program at Caloosa, it is never appropriate to bend a student's hands behind his back, push a student's head down towards a table, or bend a child's fingers into his wrist. See Pet'r Ex. 15. She also testified that a teacher should never use physical force in making a child comply with a task. She explained that if an autistic student has a temper tantrum or engages in other non-compliant behavior, the proper protocol is to call her and have the child temporarily removed from the classroom. Dormer's testimony is accepted as being the most persuasive on this issue. Therefore, while Respondent believed that her method of restraining the child was permissible and necessary under school policy, it was contrary to TEACH and constituted improper restraint of a student.

34. After receiving Dormer's report, Markgraf treated the incident as "improperly restraining a student" and contacted the Professional Standards and Equity Office (PSEO). She also collected statements from the witnesses and Dormer. At the end of the school day, Markgraf advised Respondent that she was suspended with pay, effective immediately, while the matter was further investigated. Markgraf also reported the incident to the Department of Children and Families (DCF) as possible child abuse. Although DCF took the report and investigated the

matter, no charge of child abuse was ever lodged against Respondent. Finally, D.M.'s parents were notified.

35. Based on the above incident, and "a possible pattern of inadequate classroom supervision and academic focus" prior to the incident, a pre-determination hearing was conducted by the PSEO on January 21, 2014. Notwithstanding these charges, after the hearing, Respondent was notified that she could return to the classroom for the remaining school year. Respondent was told that she would be taking the place of a K teacher who was going on maternity leave. As discussed below, it is fair to say that had D.M.'s father not conducted a one-man vendetta against Respondent in an effort to have her terminated from Caloosa, Respondent would have continued teaching at the school, at least for the remainder of the school year.

E. The Parents

36. When D.M.'s father learned that Respondent's employment with Caloosa would not be terminated, he was obviously very unhappy. Even though his child was not physically injured, he reported the incident to the Cape Coral Police Department and asked that criminal charges be filed against Respondent. A police report was prepared, but no charges were ever filed by the State Attorney's Office. See Pet'r Ex. 18. He also engaged the services of an attorney and put the Board on notice that a civil lawsuit may be filed.

37. After D.M.'s father obtained a copy of the police report, he made additional copies, stood outside the school grounds, and distributed the police report to any "parents [of students] that would take it," or anyone else who was interested, along with a cover sheet stating in pertinent part:

Please read the following police report provided by the Cape Coral Police Dept.

Regarding: Abuse to my Son by his Special Needs Teacher, Shawna Driggers

For Further Information, please contact:
[D.M.'s Father]
[telephone number omitted]

Although the father did not testify at the final hearing, it can be inferred that his intentions were to disseminate information about the incident to as many people as possible in an effort to bring pressure on the Board to terminate Respondent.

38. As a result of the distribution of the hand-out and the police report, the parents of two other children in Respondent's classroom, E.P. and G.D., contacted one another and spoke with D.M.'s father. After speaking with D.M.'s father, they decided that any perceived problems experienced by their children during the fall school year should be reported to the school and blamed on Respondent. After verifying that the police report was accurate, the parents contacted the PSEO and complained that Respondent was responsible for bruises on the legs of one child (G.D.) and a scratch mark on the neck of the

other (E.P.). They also attributed certain negative behavioral issues and lack of progress in the classroom to Respondent's actions or neglect.

39. Throughout the fall that school year, the parents received daily planners from Respondent setting forth the activities and progress of their children, and Respondent was always available to speak with them by text, email, or cell phone. They also met with Respondent on several occasions. Notably, before reading the police report given to them by D.M.'s father, and conferring with one another, they had never complained about behavior issues or progress in school to either Respondent or school officials. Ironically, the year before Respondent had been given a high rating for communications with parents, and according to Markgraf, the parents "loved her."

40. The mother of E.P., a three-year-old student with very limited communication skills, testified that her son started to become more aggressive during the first week of school, had trouble sleeping, and began screaming words that he did not hear at daycare or at home. She acknowledged, however, that his limited communication skills may have contributed to his aggressive behavior with others; that Respondent was always "brainstorming" with her throughout the fall on how to improve her son's behavior; and that Respondent was always accessible to discuss any issues about her son. She also admitted that her

negative opinions regarding Respondent may have been influenced by the police report.

41. According to E.P.'s mother, the child's behavior improved after Respondent was suspended. However, even after Respondent was replaced with a new teacher in January 2014, the mother was still dissatisfied with her child's progress, and she withdrew him from Caloosa the next month and placed him in daycare. She testified that after he enrolled in daycare, the child experienced a huge improvement in his behavior.

42. The mother of student G.D., a three-year-old who was totally non-communicative when he began the school year, testified that before enrolling in Respondent's class, her child was not violent, did not throw tantrums, and except for being "hyper," did not act out in any way. She noted that while her son made significant progress with sign language, he did not make any progress with his speech, and he consistently came home with "clusters of bruises" on his shins, which she believes were caused by Respondent striking or kicking her son. She further testified that the child's speech improved significantly and he had "a complete turnaround" after a new teacher was assigned to his class. But almost a year later in October 2014, when she testified, she admitted he still had only a "little bit" of speech. Finally, she testified that the child had issues with a diaper rash while in Respondent's care and arrived at daycare

two or three times with full diapers. Changing diapers was the responsibility of the paraprofessional, not Respondent, and these concerns were never brought to the attention of Respondent so that the problem, if generated at Caloosa, could be rectified.

43. The allegation that Respondent was responsible for physical injuries to the two students is not credited for several reasons. First, there is no credible evidence that the scratch mark on E.P.'s neck, or the bruises on G.D.'s shins, were caused by Respondent. Moreover, Wagner, who monitored the children in October and December, never observed the alleged injuries. Third, there is no record of any medical treatment at the school clinic for either student. Fourth, except for the scratch mark, the injuries were never reported to school officials at the time they were observed by the parents. As to the allegations regarding behavioral issues or lack of progress in school, they were not corroborated by any other evidence, and it is reasonable to infer that the parents were unduly influenced by the police report and conversations with D.M.'s father.

F. The April Board Action

44. Although it was previously determined that the charges against Respondent did not warrant termination, the PSEO decided to reconsider the matter after the parents came forward with

their complaints. A second investigation was conducted, and another pre-determination conference was held on April 22, 2014. After the conference, a recommendation was made to the Board to terminate Respondent, obviously due in large part to pressure from the parents and the notoriety now surrounding the December 12, 2013 incident. This resulted in the issuance of the Petition for Termination.

45. Even though Respondent taught only a portion of school year 2013-2014, Markgraf was required to prepare an evaluation for the school year. Markgraf characterized it as a "very poor evaluation compared to everyone else."

CONCLUSIONS OF LAW

46. Because the Board seeks to terminate Respondent's employment, it bears the burden of proof and must prove the allegations in the Petition for Termination by a preponderance of the evidence. See, e.g., McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); § 120.57(1)(j), Fla. Stat.

47. As a member of the instructional staff, Petitioner may be suspended or dismissed at any time during the term of her employment contract for just cause, as provided by the TALC Agreement and section 1012.33(1)(a), Fla. Stat. ("All such contracts, except continuing contracts as specified in

subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause.").

48. Section 1012.33(1)(a) establishes "just cause" as the standard for teacher discipline. Just cause includes misconduct in office.

49. Rule 6A-5.056(2) defines "misconduct in office" as follows:

(2) "Misconduct in office" means one or more of the following:

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6B-1.001 [now 6A-10.080], F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006 [now 6A-10.081], F.A.C.;

(c) A violation of the adopted school board rules;

(d) Behavior that disrupts the student's learning environment; or

(e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

50. Respondent is charged with misconduct in office as defined in each of the paragraphs by violating the Code of Ethics of the Education Profession of Florida, the Principles of Professional Conduct for the Education Profession in Florida, and Board Policies 5.02 and 5.29, which relate to Professional

Standards and Complaints Related to Employees, respectively; conduct that is disruptive to the student's learning environment; and behavior that has reduced her ability to effectively perform her duties. Although Respondent contends for the first time in her PRO that the Petition for Termination fails to identify the specific paragraphs of the Code of Ethics and Principles of Professional Conduct that Respondent allegedly violated, the charging document is sufficient to put Respondent on notice as to the violations and conduct which occasioned those violations. See, e.g., Jacker v. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1993). Moreover, to the extent there arguably may have been any ambiguity, Respondent did not seek greater clarity during discovery or the final hearing. No prejudice is found.

51. The preponderance of the evidence establishes that Respondent deviated from TEACH standards and improperly restrained a student in her classroom on December 12, 2013; that she exhibited a pattern of inadequate classroom supervision during school year 2012-2013 and the fall of school year 2013-2014 by spending an inordinate amount of time on her cell phone and in the bathroom during classroom hours; that she frequently yelled at students and was relentless in having a student finish a task; that on one occasion she attempted to force feed a student; that her conduct was disruptive to the student's

learning environment; and her conduct reduced her ability to effectively perform her duties. These established facts constitute misconduct in office within the meaning of paragraphs (2) (d) and (e).

52. The complaints by the parents, while taken as sincere, were subjective, were unduly influenced by the police report and D.M.'s father, and were not corroborated by any other credible evidence. Accordingly, they have not been credited.

53. Respondent is also charged with violating Board Policy 5.02, which relates to professional standards and requires school faculty to demonstrate "dedication to high ethical standards." However, the policy is a general aspirational standard or goal that is too vague to proscribe particular conduct and to put employees on notice of the standard to which they must conform their conduct. See, e.g., Lee Cnty. Sch. Bd. v. Rice, Case No. 13-1676, 2013 Fla. Div. Adm. Hear. LEXIS 855 at *55 (Fla. DOAH Dec. 20, 2013; Lee Cnty. Sch. Bd. Jan. 28, 2014). Likewise, Board Policy 5.29, which requires employees to "exemplify conduct that is lawful and professional and contributes to a positive learning environment for students," does not establish standards or prescribe sanctions for violation of those standards. "It is only a procedural policy governing making complaints and the investigation of those complaints." See Lee Cnty. Sch. Bd. v. Landau, Case No. 13-

4171TTS, 2014 Fla. Div. Adm. Hear. LEXIS 151 at *15 (Fla. DOAH Mar. 31, 2014) (no final order entered because employee resigned). Therefore, the allegation that Respondent violated two Board policies should be dismissed.

54. Respondent is also charged with violating paragraphs (2) and (3) of the Code of Ethics of the Education Profession, now codified in rule 6A-10.080, which read as follows:

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

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

However, it has been stated many times that these standards "are so general and so aspirational as to be of little practical use in defining normative behavior." See, e.g., Miami-Dade Cnty. Sch. Bd. v. Brenes, Case No. 06-1758, 2007 Fla. Div. Adm. Hear. LEXIS 122 at *42-43 (Fla. DOAH Feb. 27, 2007; Miami-Dade Cnty. Sch. Bd. Apr. 25, 2007). In any event, there was insufficient evidence to find a violation of these ideals.

55. Finally, Petitioner alleges that Respondent has violated the following Principles of Professional Conduct, now located in rule 6A-10.081, which state in relevant part:

(3) Obligation to the student requires that the individual:

(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health or safety.

(b) Shall not unreasonably restrain a student from independent action in pursuit of learning.

* * *

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

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

* * *

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

(a) Shall maintain honesty in all professional dealings.

The evidence supports a conclusion that Respondent's conduct amounts to a failure to protect the students in her classroom from conditions that were harmful to their mental health, to learning, and to safety, as required by paragraph (3)(a). The evidence does not support a conclusion that any other principles were violated.

56. Given the facts set forth herein, the case is now in the identical posture that it was when the first pre-determination hearing was held in January 2014. At that time, the misconduct was not considered serious enough to warrant the termination of Respondent's employment or continuance of her suspension. With clearly no change in circumstances or additional charges, Respondent's suspension should be terminated, and she should be reinstated as a special education teacher at a different school.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Lee County School Board enter a final order determining that Respondent is guilty of misconduct, as defined in rule 6A-5.056(2)(b), (d), and (e), terminating her suspension, and reinstating her as a special education teacher at a different school. All other charges in the Petition for Termination should be dismissed.

DONE AND ENTERED this 12th day of January, 2015, in
Tallahassee, Leon County, Florida.

D.R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 12th day of January, 2015.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.