STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 14-4175TTS

LUZ M. MORALES,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on January 14, 2015, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Sara M. Marken, Esquire
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For Respondent: Jorge Diaz-Cueto, Esquire
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STATEMENT OF THE ISSUES

The first issue in this case is whether, as the district school board alleges, a teacher who failed immediately to notice that her paraprofessional had left a child behind during a student activity is guilty of negligent supervision; if the alleged wrongdoing is proved, then it will be necessary to

decide whether the school board has just cause to terminate the teacher's employment.

PRELIMINARY STATEMENT

At its regular meeting on September 3, 2014, Petitioner Miami-Dade County School Board voted to approve the superintendent's recommendation that Respondent Luz M. Morales be immediately suspended without pay pending termination of her employment as a teacher. The reasons for this action were spelled out in a Notice of Specific Charges, which was served on September 16, 2014. The key allegation is that, on May 6, 2014, during a school activity at the local Walmart, Ms. Morales's paraprofessional inexplicably abandoned a wheelchair-bound, nonverbal student in the candy aisle, where the child remained, unknown to Ms. Morales, for nearly 20 minutes before being rescued. Petitioner contends that Ms. Morales is at least partially to blame for this occurrence, on a theory of negligent supervision, because she failed immediately to notice the student's absence.

Ms. Morales timely requested a formal administrative hearing to contest Petitioner's action. On September 9, 2014, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings.

At the final hearing, which took place on January 14, 2015, Petitioner called the following witnesses: Sgt. Raquel McCray

of the Florida City Police Department; Anne-Marie DuBoulay, District Director, Office of Professional Standards, Miami-Dade County School District; and Ms. Morales. Petitioner's Exhibits 2, 3, 4, and 15 were received in evidence without objection. Ms. Morales did not offer any exhibits but testified on her own behalf and called Alberto Fernandez, Ph.D., a principal in the Miami-Dade County Public Schools; and E.T., the mother of student A.P., as additional witnesses.

The final hearing transcript was filed on April 10, 2015. Each party timely filed a Proposed Recommended Order on the deadline, which had been extended to May 1, 2015, at Respondent's request.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2014, except that all references to statutes or rules defining disciplinable offenses or prescribing penalties for committing such offenses are to the versions that were in effect at the time of the alleged wrongful acts.

FINDINGS OF FACT

1. The Miami-Dade County School Board ("School Board"), Petitioner in this case, is the constitutional entity authorized to operate, control, and supervise the Miami-Dade County Public School System.

2. At all times relevant to this case, Respondent Luz M. Morales ("Morales") was employed as a teacher in the Miami-Dade County public schools. During the 2013-2014 school year, and for many previous years, Morales taught at the Neva King Cooper Educational Center, a school that provides special educational services to students with severe intellectual disabilities.

3. Among the services provided at Neva King Cooper is community-based instruction ("CBI"), which entails taking students with disabilities into the community on a regular basis to learn and practice basic skills in real-life settings.

4. On May 6, 2014, Morales took her six students on a CBI trip to the local Walmart. Accompanying Morales on this trip, to help supervise and control the students, were two paraprofessionals, Natalie Glover and Efrain Cestero. The group left the school on a bus at around 9:30 in the morning.

5. The plan was to explore books and toys in the store, purchase a snack in the McDonald's Restaurant located inside Walmart, and return to school by around 11:00 a.m.

6. Upon arriving at Walmart, Ms. Glover informed Morales that she was having some difficulty with one of the students and asked if she could skip the shopping component of the lesson and take this student straight to McDonald's. Morales agreed.

7. Before setting out to shop, Morales assigned to Mr. Cestero the primary custodial responsibility for two

students, one of whom, A.P., is unable to walk or talk and must be transported in a wheelchair. Mr. Cestero was an experienced employee with a record of good performance, and Morales's delegation to Mr. Cestero of responsibility for the safety of these students while in the store was authorized and proper. Morales herself took charge of the three remaining students, including one who was in a wheelchair.

8. After looking at toys, Morales led the group to the candy aisle. As they moved through the store, Morales and her three students stayed ahead of Mr. Cestero and his pair of students. Morales and Mr. Cestero talked with one another, but she could not see Mr. Cestero or the two students under his supervision, all of whom were following behind Morales. Morales selected some candy to purchase.

9. The group proceeded to the checkout aisles with Morales still in the lead. Mr. Cestero told Morales that he and his students would go ahead of her to McDonald's, where they would all meet again after Morales (with three students in tow) had paid for the candy and caught up with them. Morales thought this was fine and said so. She could not see Mr. Cestero and, having no reason to believe that anything might be amiss, did not turn around to look at him.

10. In fact something *was* wrong. Unbeknown to Morales, Mr. Cestero inexplicably had left A.P. behind in the candy

aisle, unattended. When he departed for McDonald's, therefore, Mr. Cestero was escorting only one student, not the two who had been placed in his care. It was shortly after 10:00 a.m.

11. Morales completed her purchase without incident. Unaware of any problem, she made her way to McDonald's, at the front of the store. As she approached the restaurant, Morales saw Ms. Glover and Mr. Cestero sitting at adjacent tables with the students, behaving as though everything were under control and showing no signs of concern or distress. She brought her three students over to the paraprofessionals, and left them in their care so that she could order snacks for the group. To Morales, the situation appeared to be normal. Responsible adults had charge of the children. Neither paraprofessional was upset or flustered; to the contrary, their demeanors were calm, even relaxed. No patently dangerous, suspicious, or unusual condition was visible to Morales. She did not notice that A.P. was missing.

12. As Morales waited in line at the McDonald's counter, she glanced over at the tables where her students and the paraprofessionals were sitting and counted heads. Morales thought she saw six students. She ordered hash browns.

13. With hash browns in hand, Morales returned to the group. As soon as she got there, she began distributing the snacks. Before she could sit down to eat, however, a police

officer arrived with A.P., who had been sitting alone in the candy aisle for nearly 20 minutes until——after worried Walmart employees had called for help——being rescued at around 10:20 a.m.

Determinations of Ultimate Fact

14. The greater weight of the evidence fails to establish that Morales is guilty of the offense of misconduct in office, which is defined in Florida Administrative Code Rule 6A-5.056(2).[1/]

15. The greater weight of the evidence fails to establish that Morales is guilty of violating School Board policies: (a) on standards of ethical conduct; (b) establishing a Code of Ethics; and (c) governing student supervision and welfare.

CONCLUSIONS OF LAW

16. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 1012.33(6)(a)2., 120.569, and 120.57(1), Florida Statutes.

17. A district school board employee against whom a disciplinary proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges has been

violated and the conduct which occasioned [said] violation." Jacker v. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J. concurring).

18. Once the school board, in its notice of specific charges, has delineated the offenses alleged to justify termination, those are the only grounds upon which dismissal may be predicated. See Lusskin v. Ag. for Health Care Admin., 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Dep't of Bus. & Prof'l Reg., 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991).

19. In an administrative proceeding to suspend or dismiss a member of the instructional staff, the school board, as the charging party, bears the burden of proving, by a preponderance of the evidence, each element of the charged offense(s). See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cnty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); MacMillan v. Nassau Cnty. Sch. Bd., 629 So. 2d 226 (Fla. 1st DCA 1993).

20. The instructional staff member's guilt or innocence is a question of ultimate fact to be decided in the context of each

alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

21. In its Notice of Specific Charges, the School Board advanced several theories for dismissing Morales: misconduct in office (Count I); ethical violations (Counts II and III); and failure to comply with policies governing student supervision and welfare (Count IV).

22. The School Board does *not* contend that Morales is strictly or vicariously liable for Mr. Cestero's plainly insufficient supervision of A.P. at Walmart.[2/] Rather, the School Board maintains that Morales "also bears responsibility" for the occurrence, on the theory that she negligently failed to notice A.P.'s absence from the group, an oversight which the School Board contends is tantamount to a breach of the teacher's duty to supervise a paraprofessional.

23. To be clear, the School Board need not prove all the elements of a negligence cause of action to terminate a teacher's employment for just cause based on a failure to supervise. Tort law, however, supplies a workable formulation of the standard of care to be used in evaluating the teacher's conduct where negligent supervision is charged as grounds for dismissal, as here. In actions for damages against a district school board based upon allegations of nonexistent or

insufficient supervision, the teacher's duty is generally described as being that of reasonable, prudent, and ordinary care under the circumstances. See, e.g., Collins v. School Bd., 471 So. 2d 560, 564 (Fla. 4th DCA 1985). Thus, to prove that Morales committed any of the offenses with which she has been charged, the School Board must establish, as a matter of ultimate fact, that Morales's conduct on the morning of May 6, 2014, fell below this standard of reasonable care.

24. The School Board sums up its rationale for assigning blame to Morales as follows:

> [I]t was Respondent's job to know [A.P. was missing]. Respondent, as the teacher, is responsible for all six students. She entrusted Mr. Cestero, her subordinate, with the task of escorting two students during the CBI activity. She delegated a task, and as his supervisor, she had the obligation of assuring that he was completing the task, otherwise she's not supervising at all.

Pet. PRO at 18. The undersigned rejects the School Board's theory, for the reasons set forth below.

25. The fundamental problem with the School Board's position is its failure adequately to account for the delegation of primary custodial responsibility for A.P. to Mr. Cestero, which all agree was reasonable and proper. The School Board's view, apparently, is that although Morales reasonably delegated this responsibility to Mr. Cestero, she could not reasonably rely upon him to carry it out. No law has been cited in support

of this proposition, and the facts of the case do not support it.

26. Clearly, the reasonableness of Morales's conduct must be considered in light of the fact that she had made Mr. Cestero responsible for taking care of A.P. Viewing the situation from Morales's perspective at the moment she placed A.P. and another student in Mr. Cestero's hands, which up to then had proven capable, the questions to ask are: Of all the things that might have gone wrong in Walmart that morning, how likely (or foreseeable) was it that Mr. Cestero inexplicably would abandon A.P. in the candy aisle——just leave him there, helpless and alone, for no apparent reason, without saying a word to anyone? Should Morales reasonably have been on guard against so egregious a dereliction of duty on Mr. Cestero's part?

27. The School Board's answer is that Morales should have noticed A.P.'s absence immediately upon entering McDonald's, if not sooner, because it would have taken her but a few seconds to count the students. This answer (which benefits substantially from hindsight) effectively ignores that fact that Morales had reasonably entrusted A.P.'s safety and well-being to Mr. Cestero. Having done that, Morales was reasonably entitled to rely upon Mr. Cestero to supervise his students (because otherwise the delegation to Mr. Cestero would have been useless

to Morales), freeing her to focus full attention on other matters, including the three students remaining under her care.

28. Of course, as the School Board claims, Morales had a duty to supervise Mr. Cestero. But "supervise" is not synonymous with "do the job of." The School Board did not offer any persuasive evidence in support of a standard of care pursuant to which a teacher must constantly count students at every opportunity to make sure that those who have reasonably been entrusted to another adult member of the instructional staff have not gone missing.

29. This is not to say that, having committed A.P. to the care of Mr. Cestero, Morales had washed her hands of the student. Her duty to exercise reasonable care under the circumstances to safeguard A.P. against harmful conditions continued. Again, however, the circumstances included the reasonable delegation of responsibility to Mr. Cestero. While the record lacks direct evidence regarding the teacher's standard of care in this particular situation, where the teacher reasonably has delegated supervisory responsibility to another, common sense and experience suggest that a distinction must be made here between the teacher's duty to discern and respond to (a) the *presence* of a patent problem, e.g., a suspicious, abnormal, or unexpected condition that is readily apparent; and

(b) the *absence* of a normal or anticipated condition, i.e., a latent problem.

30. Suppose, for example, that when Morales walked into McDonald's, instead of A.P. being absent, there had been a plume of smoke rising from his wheelchair. In that situation, a reasonably prudent teacher likely would be expected promptly to notice, and take protective measures in response to, the possibility that something was burning——a patently abnormal and potentially dangerous condition. In such circumstances, the delegation of responsibility to a paraprofessional would not likely excuse much delay or any failure to act upon observation of the smoke.

31. The School Board's position equates the *absence* of A.P. from McDonald's to the *presence* of smoke in the foregoing example. In fact, however, the two are distinguishable. In the hypothetical, something not expected to be there, was. In the instant case, someone expected to be there, was not. An ordinary person, even when exercising reasonable care, will usually notice an unusual, patent condition more quickly than she will realize that a normal element is missing——especially when there is nothing out of the ordinary about the appearance of all other conditions.

32. Thus, when Morales entered McDonald's and saw Ms. Glover and Mr. Cestero sitting at tables and behaving as if

nothing were wrong, it was not unreasonable for her initially to overlook the absence of A.P.; all the other visual cues were consistent with normal conditions. Further, because Morales had delegated responsibility for A.P.'s safety to Mr. Cestero, it was not unreasonable for her to assume, in the absence of an obvious sign to the contrary, that he was fulfilling his obligations to the student. The idea that Mr. Cestero might simply have left A.P. behind in the store without saying a word to anyone about it, while otherwise acting appropriately, undoubtedly never entered Morales's mind. The undersigned has determined that Mr. Cestero's wrongdoing, which is hard to view as other than intentional, was not reasonably foreseeable.

33. The School Board argues that it "defies logic" that Morales could have failed to notice that A.P. was missing when she left her three students with Ms. Glover and Mr. Cestero before buying the snacks, and that the "only way this could have happened" was for Morales to have had "a complete disregard for A.P.'s safety." Pet. PRO at 12. The undersigned disagrees. Because Morales neither knew nor reasonably should have suspected that Mr. Cestero had committed an act of possibly criminal neglect, it is understandable that she assumed A.P.'s presence in the restaurant despite not seeing him.[3/] Indeed, if the School Board were correct, then Ms. Glover would be guilty of completely disregarding A.P.'s safety too, for if she knew

A.P. was missing she failed to tell Morales. More likely, however, Ms. Glover was herself unaware of the fact, not because of indifference, but because, like Morales, she reasonably assumed that Mr. Cestero was watching his students as he should have been. When Morales left her three students with Ms. Glover and Mr. Cestero, it was reasonable for her to rely upon these two seemingly responsible adults, each of whom signaled by their actions that the situation was under control.

34. The School Board makes much of Walmart's surveillance videos, arguing that the available film clips show Morales having ample time to discover A.P.'s absence. To be sure, Morales's reliance upon the paraprofessionals would have become unreasonable at some point as events unfolded. The hidden camera footages are consistent with Morales's testimony, which establishes that she likely was in McDonald's for approximately five minutes, maybe a little longer, before the arrival of the police officer. While this might have begun to approach the temporal limit of reasonable reliance, the undersigned has determined that the line was not crossed. Under the totality of the circumstances of this case, the undersigned does *not* find that Morales's supervision of the students or Mr. Cestero fell below the standard of reasonable care.

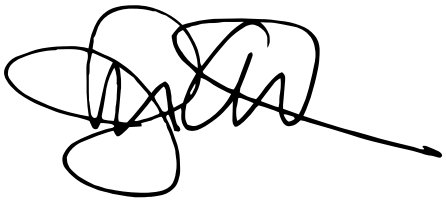
35. Because the School Board failed to prove that Morales negligently performed her duties on May 6, 2014, all of the

charges against her necessarily fail, as a matter of fact. Due to this dispositive failure of proof, it is not necessary to render additional conclusions of law.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a final order exonerating Morales of all charges brought against her in this proceeding, reinstating her as a teacher, and awarding her back salary as required under section 1012.33(6)(a).

DONE AND ENTERED this 26th day of May, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 26th day of May, 2015.

ENDNOTES

[1/] The rule provides 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 [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 [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.

[2/] The School Board stresses, however, that Morales, as the teacher, was ultimately responsible for all of the students in her class, which comes close to suggesting that she must pay the price for Mr. Cestero's poor performance. Nevertheless, the School Board has acknowledged that to establish just cause for the dismissal of Morales, under any of its theories, it must prove that she, personally, was at least partially at fault.

[3/] This is especially true because Morales knew that A.P. could not have sneaked off on his own, and she reasonably should have supposed that one of the paraprofessionals would mention that A.P. had been removed by a third party if that were the case. Obviously Morales could reasonably have believed that if either paraprofessional thought A.P. had been kidnapped, injured, or in any way threatened with harm, such a concern would be brought to her attention immediately.

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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.