STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF EDUCATION,

Petitioner,

vs. Case No. 15-1884PL

MICHAEL FORD,

Respondent.
_____/

RECOMMENDED ORDER

On June 11, 2015, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings conducted an evidentiary hearing pursuant to section 120.57(1), Florida Statutes, in Green Cove Springs, Florida.

APPEARANCES

For Petitioner: Ron Weaver, Esquire
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Douglasville, Georgia 30154-0012

For Respondent: Anthony D. Demma, Esquire
Meyer, Brooks, Demma and Blohm, P.A.
Post Office Box 1547
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STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent violated section 1012.795(1)(f),(g), and (j), Florida Statutes (2015), and Florida Administrative Code Rule 6A-10.081(3)(a) and (e), as alleged in the Amended Administrative Complaint. If it is found

that Respondent has committed any of the statute or rule violations alleged, the penalty that should be imposed must also be determined.

PRELIMINARY STATEMENT

On December 4, 2014, Petitioner, as Commissioner of Education for the State of Florida (Petitioner or the Commissioner), filed an Administrative Complaint against Respondent, Michael Ford (Respondent or Coach Ford), alleging violations of section 1012.795(1)(g) and (j), and rule 6A-10.081(3)(a) and (e). Respondent timely filed an Election of Rights form disputing the allegations in the Administrative Complaint and requested a hearing pursuant to section 120.57(1). On April 8, 2015, the matter was referred to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge.

A Notice of Hearing issued on April 20, 2015, scheduling the case for hearing on June 11 and 12, 2015. On May 19, 2015, Petitioner filed a motion for leave to amend the Administrative Complaint, and also moved to continue the hearing. The motion for continuance cited the summer vacation plans of some of Petitioner's witnesses, and noted that Respondent opposed the continuance. On May 21, 2015, an Order was issued granting the motion to amend the Administrative Complaint but denying the motion to continue, noting that there appeared to be no

impediment to taking the depositions of any witnesses who would be unavailable at hearing.

The parties filed a Joint Pre-hearing Stipulation on June 5, 2015, that included stipulated facts which, where relevant, have been included in the findings of fact below. The hearing commenced and concluded on June 11, 2015. Joint Exhibit 1 was admitted into evidence. Petitioner presented the testimony of Brett Rountree and Jessica Strunz, as well as the deposition testimony of Mary Blazek, Bridgett Payne, Toni McCabe, and Jennifer Zimmerman. Petitioner's Exhibits 2, 3, 5-7, 9-22, 25, 27-29, and 33-38 were admitted into evidence at hearing. Respondent objected to Petitioner's Exhibits 4, 23-24, 26, and 30-32. Ruling on the admissibility of these exhibits was reserved in order to review the deposition testimony related to them, and the parties were directed to address the admissibility of these exhibits in their proposed orders. However, neither party addressed the admissibility of these exhibits. Accordingly, after review of all of the evidence, Petitioner's Exhibit 4 is rejected as irrelevant; Petitioner's Exhibits 23-24 are admitted for the sole purpose of demonstrating that there was media coverage with respect to the incident at issue in this case; Petitioner's Exhibit 26 is admitted; and Petitioner's Exhibits 30-32 are rejected.[1/]

Respondent testified on his own behalf and presented the testimony of Martin Powell, Bonny Lawrence, Janet Rowe, Edward Huffman, Curtis Oliver, and Tracey Butler. Respondent's Exhibits 5-7 were also admitted into evidence.

The two-volume Transcript of the proceedings was filed with the Division on June 29, 2015. At the request of the parties, the deadline for submitting proposed recommended orders was extended to August 5, 2015, by Order dated July 20, 2015. Both party's submissions were timely filed and have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the demeanor and credibility of the witnesses, the documentary evidence admitted and the record as a whole, the following findings of fact are found:

1. Respondent holds Florida Educator's Certificate 823554, covering the area of physical education. His certificate is valid through June 30, 2016.

2. At all times material to the allegations in the Amended Administrative Complaint, Respondent was employed as a physical education (P.E.) teacher at Oakleaf Junior High School (Oakleaf) in the Clay County School District (the District). Mr. Ford also served as a track and field coach in the District and was heavily involved in volunteer activities to encourage youth fitness. In 2008, the Education Practices Commission issued a final order

which adopted a settlement stipulation with respect to a prior complaint against Respondent. The settlement stipulation "neither admitted nor denied" the factual allegations in the Administrative Complaint giving rise to the disciplinary proceeding in that case.

The Scene

3. Oakleaf is a junior high with sixth through eighth-grade students. During the 2012-2013 school year, there were six P.E. teachers who typically had classes of at least 40 students each class period. These classes made use of the baseball and softball fields, tennis and basketball courts, and the gymnasium for class time. All of the students shared what were described as small girls' and boys' locker rooms adjacent to the gymnasium.

4. Students and teachers have approximately ten minutes at the end of each class period to get to their respective locker rooms, change clothes, and get ready to move to the next class period. Usually one male and one female P.E. teacher were assigned to open the gender-specific locker rooms. Until the locker rooms were opened and after students finished dressing, the students congregated in the P.E. building hallway. The space where students waited was cramped at best, and not adequate to accommodate the large numbers of students.

5. During the 2012-2013 school year, students were expected to wait in the hallway near the double doors closest to the P.E.

fields for the ringing of the class bell. Students typically stayed as close to the doorway as possible in order to ensure a quick exit. While students were supposed to sit against the wall, they often either stood near the double doors or sat with their legs stretched out into the aisle-way. Traversing the area could be a challenge under the best of circumstances. A typical day could be described as loosely-organized chaos. As described by Bonnie Lawrence, Oakleaf's physical education department head, "it's not that the kids are so bad; it's just that you've got a large amount of students that are hot . . . they're worked up. . . . [A] lot of them are very competitive, so they're still bringing it into the hallway, and it just . . . is a problem and it still is a problem."

6. In the first week of April 2013, one of the students attending Oakleaf was a seventh grader named D.O.[2/] D.O. was a relatively tall student, described as a big boy between 5'8" to 5'10". D.O. received exceptional education services for emotional behavioral disorder (EBD). EBD students are placed in EBD special education classrooms because of emotional and/or medical issues that render them unusually disruptive and volatile in a traditional classroom setting.

7. D.O. participated in regular P.E. classes and was assigned to Coach Rountree's class. D.O. was a difficult student and had been removed from P.E. class the week before spring break

because of behavioral issues. D.O. was easily agitated and unpredictable. When angry, he used a lot of profanity and walked very quickly. D.O. had at least three disciplinary referrals processed during the school year for his misbehavior. One P.E. teacher admitted that she had been verbally attacked by him and found him intimidating. Ms. Lawrence stated that while she had never seen D.O. attack another student, she had witnessed him hitting the walls with his fists.

8. Because EBD students can be prone to frequent outbursts and sometimes violent behavior, they are often escorted around campus and directly monitored by a behavioral aide when the students go to lunch, travel to and from bus areas, or participate in any regular education classes. Jessica Strunz was the aide assigned to escort D.O. during the timeframe relevant to this proceeding. Petitioner relies on her testimony almost exclusively concerning what happened with respect to the incident alleged in the Amended Administrative Complaint.

9. April 2, 2013, was the first school day after spring break. D.O. had been removed from P.E. for misbehavior the week before spring break, but on April 3, he was back in the gym. D.O. was assigned to Coach Rountree's class. Coaches Ford and Rountree observed paint on D.O.'s shoes, consistent with some paint used in recent vandalism of cars in the area. They asked D.O. about the paint, and talked to him about making better

decisions, and the consequences that flow from making poor choices. Coach Ford used his own vehicle as an example, and told D.O. if someone were to spraypaint his wife's truck, there would be damages that would have to be paid, as an illustration of the consequences of bad decisions. He indicated that a perpetrator's parents would be responsible for those damages as one of those consequences. Ms. Strunz was present during this discussion.

The Incident

10. On April 3, 2013, D.O. was again present for P.E. Ms. Strunz escorted D.O. to P.E. but soon after left the area to assist another aide, believing that D.O. was fine with Coach Rountree.

11. Coach Rountree's class was going to be playing frisbee on the baseball field. However, Coach Rountree would not allow D.O. to be paired with his partner of choice, because they had previously caused disruptions in the class. When Coach Rountree told him he would have to partner with someone else, D.O. became angry and started using profanity and questioning Coach Rountree's authority. As a result, Coach Rountree told D.O. to take a seat in a chair that was on the baseball infield as a time-out. Instead, D.O. flung the back of the chair over, and Coach Rountree spoke to him in an attempt to calm him down. Eventually, D.O. sat in the chair and Coach Rountree went back to supervising the rest of his class.

12. Sitting in the chair, however, did nothing to calm D.O. Instead, he became angrier, kicked the chair, and started yelling insults and profanity at the other students in the class. He was apparently trying to provoke a reaction from another student by making statements such as, "you're gay, and your father's gay," in addition to the profanity. At some point, he got up and threw the chair down rather than sit on it.

13. Coach Ford was in the area supervising his students, who were split between the basketball and tennis courts. He approached D.O. and told him that he thought D.O. was supposed be sitting in the chair. Eventually, D.O. sat back down, but continued to spew profanities directed at another student in his class.

14. Ms. Strunz returned to the field at this point and found D.O. sitting in the time-out chair. As she put it, D.O. was angry at the world, upset, yelling, and cursing. Rather than approach him directly, Ms. Strunz stayed on the other side of the fence and tried to calm him down by talking to him, but D.O. ignored her. At hearing, Ms. Strunz did not seem overly concerned about the propriety of D.O.'s behavior, saying, "he just does that."

15. D.O.'s tirade continued, and he stood and threw the chair down the baseline from first base toward home plate. At that point, he left the infield to sit in the bleachers behind

home plate. As he passed the gate near the dugout, he reached up and pulled Coach Rountree's grade book from where it was wedged between the fence sections and threw it up into the air. D.O. then sat down but continued to curse and yell.

16. Coach Ford came back over to speak to D.O., attempting to calm him down and talking to him about making better choices. He also called Coach Rountree on his radio about D.O. moving from the seat where Coach Rountree had directed him to sit. Coach Rountree came over to the area and spoke with both Coach Ford and Ms. Strunz, who told him that D.O. had stood up out of his seat, kicked the chair, and thrown Coach Rountree's grade book. At this point, D.O. was sitting in the bleachers and for the moment was calmer, so Coach Rountree went back to the rest of the class, believing Ms. Strunz had the situation under control. Ford, likewise, went to direct his class to line up and go in the building.

17. D.O.'s mood fluctuated between calm and anger. It was, at best, unpredictable. After Coach Rountree went back to the rest of his class, D.O. got up from his seat in the bleachers and started walking quickly to the doors of the P.E. building, with Ms. Strunz following behind.[3/] D.O. was yelling, cursing, and saying how much he hated the school. Coach Ford followed him in in an attempt to calm him down, continuing to talk to him about the need to make better choices. D.O. was not interested.

Instead, as he approached the building, D.O. told Coach Ford to "shut the f**k up,"[4/] slammed his hand against the left side of the double doors, and started to swing open the door to the hallway.

18. At this point, Coach Ford reached out and restrained D.O. from behind to prevent him from going into the hallway. Coach Ford put his right arm around D.O.'s chest and used his own left arm to secure D.O.'s left forearm to keep D.O. from swinging it, and pulled D.O. away from the door. D.O. attempted to pull away from Coach Ford, and Coach Ford had to jerk him up slightly so as to keep him from falling off balance and into the eroded area next to the sidewalk. The momentum of keeping both of them out of the eroded area propelled them over to a railing near the walkway, beside an adjacent portable. The entire maneuver by all accounts lasted a matter of seconds. Coach Ford then told D.O. he was going to release him and that D.O. needed to stay calm and stand next to the building. Coach Ford's purpose in having D.O. stand next to the building was to minimize the interaction between D.O. and the other students in Coach Rountree's class, who were approaching from the baseball field in order to enter the hallway. D.O. stood next to the building as instructed.

19. D.O. was not injuring himself and was not attacking any other student before attempting to enter the building. He was, however, about to enter a crowded area full of students in an

angry and agitated state soon after kicking and throwing a chair and throwing a teacher's grade book, and while shouting profanities and what could be interpreted as derogatory comments toward other students.

20. Shortly thereafter, Coach Rountree and his students caught up to Coach Ford, and Coach Rountree, Coach Ford, and D.O. stood at the side of the building while Ms. Strunz was standing at the railing by the walkway. Once Coach Rountree caught up to them, Ms. Strunz went inside to coordinate with another aide, and Coach Rountree directed his other students to go inside. When Coach Rountree approached, both Coach Ford and D.O. appeared to be fairly calm. However, as was the case earlier, D.O.'s mood fluctuated between extremely agitated to calm to agitated again, and he started saying he was going to sue the school. Coach Ford continued to try and calm him, but dismissed D.O.'s threat of litigation by saying something to the effect that D.O. did not know what teachers are allowed to do.

21. Ms. Strunz returned and Coach Ford left the area to attend to his students. D.O.'s mood continued to fluctuate, and he made a statement to the effect of, "you're all screwed, and this place is going down," and that the school was in big trouble because he was going to sue the school. When Coach Rountree asked him what he meant, D.O. was not listening to him, but kept repeating that they were all screwed. At some point during this

tirade, which lasted about five minutes, D.O. noticed that he had a small scrape on his elbow about the size of a nickel, with a small amount of blood. This observation upset him all over again, and he started walking quickly to the administrative offices, with Coach Rountree and Ms. Strunz following behind.

22. D.O. made his way to Assistant Principal Bridget Payne's office, with Coach Rountree and Ms. Strunz following behind. D.O. told her, "look at what one of your teachers did to me." He proceeded to show her his arm and to tell her that Coach Ford had put him in a chokehold and threatened to put him in the hospital. Ms. Payne asked him to pull down his shirt, and he did so, showing that there was some redness below the Adam's apple. Ms. Payne testified that the red area was about half an inch to three quarters of an inch wide, and that she could not see it until he pulled down his shirt. After D.O. finished telling his story to Ms. Payne, Ms. Strunz was asked to confirm it or say anything about it, and she confirmed D.O.'s story.

The Aftermath

23. Both Coach Rountree and Ms. Strunz were asked to write statements, and both did so. Only Ms. Strunz's statement refers to a chokehold. Ms. Payne called D.O.'s mother and informed her of the incident, and D.O.'s mother, in turn, called the police. Ms. Payne then notified Coach Ford that the police were coming but did not talk to him about the incident.

24. Ms. Payne also sent D.O. to Mary Blazek, the school nurse, who examined his arm and neck. She treated the arm with Bactine and a Band-Aid, which she described as "not major first-aid treatment." Ms. Blazek also observed some redness on D.O.'s neck. She had been told that he was restrained around his neck so she was looking for redness. She did not inquire as to any other reasons that might have caused his neck to be red, and there was no evidence indicating that Ms. Blazek or anyone else observed scratches, welts, or bruising on his neck, or that the redness extended around to either side of his neck. Ms. Blazek filled out an incident report, but not until eight days after the incident when she was asked to do so.

25. Oakleaf's principal contacted Toni McCabe, the assistant superintendent for the District, and Ms. McCabe began an investigation into the incident. Coach Ford was suspended with pay on April 4, 2013, pending completion of the investigation.

26. Ms. McCabe did not interview D.O. as part of her investigation and did not review his disciplinary referrals other than the one issued to him regarding his behavior the day of the incident. She only spoke to those staff members who were directly involved in the incident and could provide eyewitness testimony. Based upon her investigation, she recommended to the

superintendent that Coach Ford be terminated, and although it is not clear when, Coach Ford eventually resigned.

27. Ms. McCabe testified that when she spoke to Coach Ford, he stated that he had used a Safe Crisis Management (SCM) hold, and that a chokehold is not a SCM hold. SCM training is generally provided to administrators and those teachers working in special education. Coach Ford had taken SCM training but was not currently certified. P.E. teachers at Oakleaf had requested SCM training repeatedly, but it was not provided to them. Coach Ford denied stating that he used SCM in dealing with D.O., and denied using a chokehold. Tracey Butler is the Florida Education Association representative who attended both meetings Respondent had with Ms. McCabe regarding the incident with D.O. Ms. Ware, a District employee, took notes of the meetings, as did Ms. Butler. Ms. Butler did not recall Coach Ford ever telling Ms. McCabe that he used a SCM hold. The only mention of the term in her notes was one indicating Ms. McCabe asked if Coach Ford had SCM training. Her review of Ms. Ware's notes indicated the same question and response, but no indication that Respondent stated he used a SCM hold. The undersigned finds that Coach Ford did not state to Ms. McCabe that he was using a SCM hold.

The Criminal Proceedings

28. As noted previously, the Clay County Sheriff's Office also investigated the incident. The statements taken by Coach

Rountree and Ms. Strunz were also provided to the Sheriff's Office. On April 8, 2013, Coach Ford was arrested for child abuse/simple battery as a result of the incident. On May 6, 2013, he was officially charged with violating section 827.03(1)(b), Florida Statutes.[5/] His case was docketed as Case No. 2013-CF-000686.

29. On June 4, 2013, Respondent entered an agreement to go into a pretrial intervention program (PTI). Consistent with the requirements for entry into the program in the Fourth Judicial Circuit, he signed a document entitled "Plea of Guilty and Negotiated Sentence." The State Attorney in the circuit required that in order to enter into a pretrial diversion program, defendants were required to sign a guilty plea agreement which would not be entered on the docket of the court. Upon successful completion of the requirements of the PTI, the State Attorney's Office would dismiss the charges. However, if a defendant failed to complete the PTI requirements, the guilty plea would be filed and the defendant would be sentenced based on the guilty plea.

30. The form that Respondent signed states in part:

> Specific Terms of Negotiated Sentence:
> My sentence has been negotiated in this case in that I will be:
>
> _____ Adjudicated guilty
> _____ Adjudication of guilt withheld

> And I will be sentenced to: (Please print)
> _____
> _____
> _____

31. In the blank space provided, the following agreement is hand-written:

> Post-plea PTI: upon completion of anger management and no contact with the victim, D.O., the state attorney will dismiss charges. If unsuccessful, plea will be an open plea to the court.

32. The entry into the PTI program was discussed in open court, but the evidence did not establish that the trial judge engaged in a traditional colloquy regarding the voluntary nature of the plea, and the document that Respondent signed was not docketed in the court record. On June 6, 2013, a Diversion Referral Notice was sent to the Clerk of Court by the Assistant State Attorney advising that the case was being referred to the Felony Pre-Trial Intervention Program, and that the State would file a final disposition at the time of successful completion.

33. On July 19, 2015, the Director of the PTI program notified the Clerk of Courts that the case had been accepted into the PTI program. On October 10, 2013, the State Attorney's Office filed a Diversionary Nolle Prosequi dismissing the charges.

34. The Case Summary for Case No. 2013-CF-000686 indicates that the following documents were filed on the criminal docket:

a notice to appear; a notice of cash bond; the affidavit for arrest warrant; warrant returned served; arrest and booking report; notice of appearance, waiver of arraignment, not guilty plea and demand for trial; information; state's discovery exhibit and demand for reciprocal discovery; victim information form; diversionary program referral notice; diversionary program referral (accepted); cash bond release; and diversionary nolle prosequi.

35. The document entitled Plea of Guilty and Negotiated Sentence was not filed on the docket in the criminal proceedings.

The Nature of the Restraint

36. Throughout these proceedings, Petitioner has referred to the restraint of D.O. as a chokehold. The unfortunate use of the term originated with D.O.'s comments to Ms. Payne. D.O. did not testify in this case.

37. The only witnesses to the actual incident that testified in these proceedings are Coach Rountree, Coach Ford, and Ms. Strunz. Coach Rountree candidly stated that he did not see the entire incident. He demonstrated what he observed of the interaction between Coach Ford and D.O. His demonstration indicates that Coach Ford had his arm across D.O.'s upper chest.

38. Jessica Strunz was described as being somewhere between three feet and 30 feet away from Coach Ford and D.O. Given the testimony regarding D.O.'s size and pace as he walked toward the

gym, the most plausible conclusion is that she was somewhere between 10 and 15 feet behind him.[6/] It is Ms. Strunz's testimony that places Ford's arm around D.O.'s neck. That testimony is not credited.

39. First, Ms. Strunz is shorter than D.O. and possibly shorter than Coach Ford. If she was behind Coach Ford, who was behind D.O. when he started to go through the door of the gym, it would be difficult, if not impossible, for her to see where Coach Ford's arm was located in front of D.O.

40. Second, the height difference between Coach Ford and D.O. also weighs in favor of a restraint across the chest, as both Coach Ford and Coach Rountree demonstrated. Third, the redness on D.O.'s neck was reported to be just above his collarbone at the front of his neck. He had to pull down his shirt in order for the red mark to be seen. Had Coach Ford had D.O.'s neck in the crook of his arm, as Ms. Strunz testified, it seems that any redness would have extended to at least one side of his neck, and no one testified that was the case. Moreover, D.O. had been outside on a baseball field on a warm day. He was angry, had been yelling, had kicked a chair, and had thrown a chair in the 30 minutes leading up to this event. There is not clear and convincing evidence that the redness on his neck was caused by the restraint at all. The same can be said for the small scrape on his elbow.

41. The more persuasive testimony indicated, and it is found, that Coach Ford restrained D.O. by placing his arm across the upper chest area. He did so not because D.O. had hurt himself or anyone else at that point, but based upon his concern that should this demonstrably angry young man enter the crowded hallway, the normally chaotic atmosphere with close to 100 waiting students would turn into a dangerous one with a real possibility of injury to D.O., to other students in the hallway, or both.

Reasonable Use of Force

42. The District has adopted a definition of the reasonable use of force for teachers, as required by section 1006.11, Florida Statutes. The District's policy states the following:

> CLAY COUNTY SCHOOL BOARD POLICY 6GX-10-2.32
>
> 2.32 USE OF REASONABLE FORCE
>
> As provided by Florida Statute 1006.11, this policy establishes the standards for the use of reasonable force by Clay County school personnel. Such use shall be for the purpose of establishing and maintaining a safe and orderly environment and shall provide guidance to school personnel in dealing with disruptions to that environment.
>
> A. Definition of Terms: The following definitions apply to terms used in this policy:

Learning Environment: All events and activities authorized by the School Board requiring an employee to be on duty in/out of the classroom setting.

Orderly: Devoid of disruption or violence; peaceful. An orderly environment is one in which learning can take place.

Disruption: An interruption of or impediment to the usual course of harmony.

Reasonable Force: Appropriate professional conduct including reasonable force as necessary to maintain a safe and orderly learning environment.

Safe: Preventing injury or loss of life, a safe environment is one in which persons are protected from injury or threat of injury.

School personnel: Employee/individual hired by the School Board.

B. Conditions that may require use of reasonable force:

While use of physical force may be needed at times to ensure a safe and orderly learning environment, alternatives to such force should be attempted, time permitting.

The use of reasonable force is permitted to protect students from:

1. conditions harmful to learning;

2. conditions harmful to students' mental health;

3. conditions harmful to students' physical health;

4. conditions harmful to safety;

5. other conditions which, in the judgment of on-site employee(s), threaten the safety and welfare of students or adults.

C. Guidelines for the determination of "reasonableness" of force:

When school personnel employ physical force in order to maintain or restore safety and/or order to a situation, determinants as to the reasonableness of force shall include, but not be limited to:

1. severity of the offense(s);

2. size and physical condition of participant(s);

3. patterns of behavior;

4. potential danger; physical and other;

5. availability of assistance;

6. other circumstances surrounding the offense; and

7. actions taken prior to use of physical force.

D. Other factors:

1. Reasonable force cannot be excessive or cruel or unusual in nature.

2. Physical force being used should cease upon the restoration of a safe and orderly environment.

> 3. Nothing in this policy should be construed as addressing Clay County School Board polic(ies) on corporal punishment.
>
> 4. Use of these guidelines shall provide guidance to school personnel in receiving the limitations on liability specified by Florida Statutes. (Emphasis added).

43. There was testimony that under Clay County's policy on reasonable force, restraint should be used only in the most extreme cases, such as when a student is going to seriously injure himself or someone else. None of those espousing this view indicated that they had ever had 40 students on a P.E. field or had ever taught P.E. Ms. Payne and Ms. Zimmerman both acknowledged that they had never done so. While such an example is certainly covered by the policy, the plain language of the policy is not that restrictive. Coach Ford testified, and maintained consistently throughout the various inquiries related to this incident, that his concern was for the safety of both D.O. and the other students in the hallway, should D.O. enter this crowded area at the level of crisis he was exhibiting in the period immediately prior to his approach to the door. Every P.E. instructor who testified emphasized that student safety is their primary concern. Here, Coach Ford was concerned about anyone getting run over or injured given D.O.'s clearly agitated state. This concern fits squarely within the policy's directive to

"maintain a safe and orderly learning environment," including an environment which is "devoid of disruption or violence" and where "persons are protected from injury or threat of injury."[7/] It is found that Coach Ford's actions fell within the confines of, and was not prohibited by, the District's policy on the use of reasonable force.

The Alleged Threat

44. Ms. Strunz testified that Coach Ford threatened D.O. almost immediately prior to the restraint, saying that if he found paint on his car, he would come look for D.O. and would put him in the hospital; and that D.O. did not know what he was capable of. Coach Ford adamantly denied this allegation. These alleged threats were supposedly made just moments after, according to Ms. Strunz, Coach Ford was telling D.O. he needed to make better choices and was trying to calm him down.

45. That anyone, including Coach Ford, would make such a statement immediately after working repeatedly to calm D.O. and after talking to him about better choices, simply strains credulity. It was not clear where Ms. Strunz was when Coach Ford told D.O. that D.O. was not aware what teachers were allowed to do. It may be that she misinterpreted this statement as a threat. In any event, there is not clear and convincing evidence that Coach Ford made any threat to D.O.

Diminished Effectiveness

46. Petitioner presented evidence of news accounts of the incident, in support of the allegation that Respondent's effectiveness had been reduced, along with the opinion of Ms. McCabe (who believed that Respondent had used a chokehold) to that effect. On the other hand, Bonny Lawrence, the department head for the P.E. department at Oakleaf, testified that she would "absolutely not" have a problem with Coach Ford coming back on her staff. Janet Rowe, the athletic director and a P.E. teacher at Oakleaf, considers Ford to be a highly-effective P.E. coach. Edward "Smitty" Huffman, who has taught physical education for most of his 20 years in education, considers Coach Ford to be one of the better teachers he has ever known. It is found that Petitioner did not establish by clear and convincing evidence that Respondent's effectiveness as a teacher has been reduced.

CONCLUSIONS OF LAW

47. 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), Florida Statutes (2015).

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

49. This is a proceeding in which Petitioner seeks to revoke Respondent's educator certification. Because disciplinary proceedings are considered to be penal in nature, Petitioner is required to prove the allegations in the Amended 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).

50. 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:

> 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). Moreover, the allegations against Respondent must be measured against the law in effect at the time of the commission of the acts alleged to warrant discipline. McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013).

51. 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.

52. Charges in a disciplinary proceeding must be strictly construed, with any ambiguity construed in favor of the licensee. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l 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).

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

> 3. On or about July 7, 2005, the Commissioner of Education determined probable cause to sanction the Respondent's Florida Educator Certificate for a 2004 Driving Under the Influence with Property Damage. On or about May 12, 2006, the Education Practices Commission issued a Final Order accepting a settlement agreement with the Respondent.

4. On or about April 3, 2013, the Respondent inappropriately and unreasonably restrained a thirteen-year-old male student while making a threatening comment to him.

5. This was reported in the local media.

6. On or about April 4, 2013, the Respondent was suspended with pay.

7. On or about April 9, 2013, the Respondent was arrested and charged with Child Abuse (Simple Battery/Assault).

8. On or about May 17, 2013, the Respondent's employment with Clay County School District was terminated.

9. Subsequently, the Respondent pled guilty and entered into a pre-trial diversion program.

10. On or about October 10, 2013, the Assistant State Attorney entered a Nolle Prosequi with respect to the charge.

54. The evidence established that in 2005, Respondent entered into a settlement stipulation with the Florida Education Commission to resolve charges from 2004 (which is relevant only in terms of possible penalties), and that on April 3, 2013, Respondent restrained a student after several minutes of trying to calm the student in order to prevent him from entering a congested area. The evidence did not establish that the restraint used was a "chokehold" or an unreasonable restraint: to the contrary, the evidence indicated that the restraint was within parameters identified in the written use of reasonable force policy for the

Clay County School District. The evidence did establish that the incident was reported in the media; that Respondent was suspended with pay; and that, ultimately, Respondent's employment with the District was concluded. Finally, the evidence demonstrated that Respondent was charged with child abuse/simple battery; that he entered and successfully completed a PTI; and that the criminal charges were nolle prossed.

55. Count 1 charges Respondent with violating section 1012.795(1)(f), which makes it a basis for discipline when an educator "[h]as been convicted or found guilty of, or entered a plea of guilty to, regardless of adjudication of guilt, a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation." Respondent was not convicted or found guilty of any criminal violation. The issue for determination is whether the document used for entry into the PTI constitutes having "entered" a plea of guilty. The undersigned concludes that it does not.

56. Florida Rule of Criminal Procedure 3.170(k) provides that "[n]o plea of guilty or nolo contendere shall be accepted by the court without the court first determining, in open court, with means of recording the proceedings stenographically or mechanically, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness and that there is a factual basis for the plea of

guilty. A complete record of the proceedings at which a defendant pleads shall be kept by the court." Formal acceptance of the plea occurs when the court affirmatively states to the parties in open court that the court accepts the plea. Until the court formally accepts the plea, it is not binding on anyone. Collucci v. State, 903 So. 2d 333, 334 (Fla. 5th DCA 2005).

57. In A.D.W. v. State, 777 So. 2d 1101 (Fla. 2d DCA 2001), a juvenile entered an agreement called a rehabilitation plan that included a provision similar to the one at issue here, requiring the petitioner to enter a plea of guilty if he did not comply with the rehabilitation plan's conditions. A.D.W. did not comply with the agreement and a guilty plea was entered pursuant to the agreement. A.D.W. filed a petition for writ of prohibition and the Second District granted the writ, stating:

> Here, the parties have not indicated to this court that at the time of the agreement the trial court initiated a plea colloquy or established that A.D.W. was knowingly, intelligently, and voluntarily waiving his right to an adjudicatory hearing on this charge, and no plea was entered by A.D.W. at the time the agreement was filed.
>
> The stipulation to enter a plea cannot validly act as a plea without a contemporaneous plea colloquy indicating that the defendant knowingly, intelligently, and voluntarily waived his rights. Any error in the plea colloquy would be correctable on appeal, but a complete absence of a knowing, intelligent, and voluntary waiver vitiates the agreement to enter a plea. The fact that the executory

> agreement was accepted by the court did not transform this executory agreement into a plea agreement due to the requirement that a plea to waive any constitutionally protected right must be knowingly, intelligently, and voluntarily entered by the defendant with an adequate inquiry by the trial court.

777 So. 2d at 1104.

58. The same rationale applies here. In this case, the agreement was entered for the purpose of entry into the PTI program. The trial judge did not engage in a traditional plea colloquy and no guilty plea was entered into the record of the criminal proceeding. Accordingly, the evidence does not demonstrate by the clear and convincing standard that Respondent violated section 1012.795(1)(f).

59. Count 2 charged Respondent with violating section 1012.795(1)(g) by being found guilty of "personal conduct which seriously reduces effectiveness as an employee of the school board." While Ms. McCabe offered the opinion that Coach Ford's effectiveness was negatively affected, she also believed, based upon her limited investigation, that Coach Ford restrained D.O. with a chokehold and threatened him, both allegations that are rejected as contrary to the greater weight of the evidence. On the other hand, teachers who had worked closely with Coach Ford testified that he was a very effective teacher and they would not hesitate to work with him again. Count 2 has not been proven by clear and convincing evidence.

60. Count 3 charges Respondent with violating section 1012.795(1)(j), by violating the Principles of Professional Conduct for the Education Profession prescribed by the State Board of Education rules. This charge rests on the ability to prove the violations alleged in Counts 4 and 5. Given the recommended disposition of those counts, Count 3 should be dismissed.

61. Count 4 charges a violation of rule 6A-10.081(3)(a), for failure to "make reasonable effort to protect the student from conditions harmful to learning and/or the student's mental health and/or physical health and/or safety." In order to evaluate Respondent's conduct, it must be determined whether his conduct was reasonable, i.e., whether a reasonable person would consider that he was making an effort to protect not only D.O., but other students. If the evidence had demonstrated that Respondent actually used a chokehold or threatened D.O., then of course a violation would be demonstrated. However, the evidence showed a young man who had been angry and agitated for an extended length of time. He had already called out insults and profanity to students and teachers alike, kicked and thrown a chair, and thrown a teacher's grade book. D.O. had already ignored verbal directives, and in this agitated state was about to enter a congested area filled with students. Coach Ford's actions were designed to prevent, not cause, harm to both D.O. and the other students in the hallway. While there may have been other methods

to address the situation, it cannot be said that no reasonable person would have taken the actions that Coach Ford took to prevent the situation from escalating further. Count 4 has not been proven by clear and convincing evidence.

62. Finally, Count 5 charges Respondent with violating rule 6A-10.081(3)(e), alleging that he "intentionally exposed a student to unnecessary embarrassment or disparagement." D.O. did not testify, so we cannot know whether he was actually embarrassed. However, a review of the evidence indicates that any negative statements made about D.O. were more likely made as a result of the behavior he exhibited as opposed to the actions of Respondent. Further, Respondent made an effort to have him stand away from the other students in order for him to calm down without others making fun of him. There is not clear and convincing evidence to support a violation of rule 6A-10.081(3)(e).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a Final Order dismissing the Amended Administrative Complaint.

DONE AND ENTERED this 28th day of September, 2015, in Tallahassee, Leon County, Florida.

LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of September, 2015.

ENDNOTES

[1/] Petitioner's Exhibits 30-32 are letters regarding a prior alleged incident in 2008. They are not only hearsay, but seek to establish prior bad acts by Respondent. It was not established that notice of the intent to offer evidence of prior bad acts, as required by section 120.57(1)(d), Florida Statutes, was provided.

[2/] D.O. is identified by his initials because of his status as both a student and a minor. D.O. did not testify at hearing.

[3/] While Ms. Strunz' exact height is unknown, she is several inches shorter than the height described for D.O. She acknowledged that when D.O. was walking to Ms. Payne's office, he was walking so fast that she had to run to keep up with him. Her testimony was not consistent regarding D.O.'s pace, but the more credible testimony was that when D.O. is angry, as he was during most of this sequence of events, he walked fast. The more credible evidence is that Ms. Strunz was lagging behind D.O. and Coach Ford, and was not as close as the three feet she described.

[4/] No purpose is served by repeating the language used, but it is noted that the testimony was uniform that this particular language was a frequently-used term in D.O.'s tirades on both this day and other days. It is further noted that D.O.'s use of

profanity was not sparing, but constant during the course of this incident.

[5/] The charging document erroneously states that the offense took place on April 20, 2013.

[6/] Ms. Strunz stated that she was approximately three feet behind D.O. as they walked toward the gym. She later states that she was next to D.O. as he approached the door. Ms. Strunz also testified that D.O. walks fast when he is angry and that he was angry as he approached the gym, but that he was not walking fast at that time. The more persuasive and plausible evidence is that D.O. was walking fast and that Ms. Strunz was still some distance behind him as he approached the door.

[7/] One wonders what ramifications there would have been had D.O. entered the hallway and the situation had escalated as Coach Ford feared. It seems entirely possible that someone, including Coach Ford, would have been subject to the charge that he or she did nothing to protect D.O. and the students in the hallway from conditions harmful to their safety. Of course, this conclusion would be different had the evidence supported the allegation that Coach Ford actually used a chokehold, no matter the legitimacy of his concerns for safety. However, no such finding is warranted where the evidence does not support the allegation that a chokehold was used.

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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.