

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HERNANDO COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 15-2319TTS

TERESA WIMMER,

Respondent.

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RECOMMENDED ORDER

This case was heard on July 7, 2015, in Brooksville, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas Martin Gonzalez, Esquire  
Thompson, Sizemore, Gonzalez  
and Hearing, P.A.  
Suite 1600  
201 North Franklin Street  
Tampa, Florida 33602-5110

For Respondent: Mark S. Herdman, Esquire  
Herdman and Sakellarides, P.A.  
Suite 110  
29605 U.S. Highway 19 North  
Clearwater, Florida 33761-1538

STATEMENT OF THE ISSUE

Whether Respondent, Teresa Wimmer, violated Florida Administrative Code Rules 6A-10.080, the Code of Ethics of the Education Profession in Florida (Code of Ethics), or 6A-10.081,

the Principles of Professional Conduct of the Education Profession in Florida (Principles of Professional Conduct), as alleged in the Hernando County School Board's March 9, 2015, notice of recommendation of termination, and March 24, 2015, modification of that notice; and, if so, the nature of the sanctions.

PRELIMINARY STATEMENT

On March 9, 2015, the Hernando County School District superintendent of schools notified Respondent of the superintendent's intent to recommend that the Hernando County School Board (School Board) terminate Respondent's employment as a teacher at the Pine Grove Elementary School (Pine Grove). Prior to the proposed termination, Respondent taught a first-grade class.

The notice of recommendation of termination alleged that Respondent engaged in an incident of "pulling/dragging a student to the front office." On the basis of that alleged conduct, Petitioner alleged that Respondent violated rules 6A-10.080(2) and (3), rules 6A-10.081(3)(a) and (3)(e), and the School Board Policy/Staff Handbook (Staff Handbook).

On March 23, 2015, Respondent timely filed a Petition disputing the allegations in the recommendation of termination. On March 24, 2015, Respondent was notified that the recommendation to the School Board would be modified from

termination to suspension without pay pending resolution of her challenge.

The Petition was referred by the School Board to the Division of Administrative Hearings on April 22, 2015. The matter was noticed for hearing on July 7, 2015, and was held as scheduled.

At the final hearing, Petitioner presented the testimony of Nancy Johnson, who was, at all times relevant hereto, the assistant principal at Pine Grove; Paul Leftwich, the School Board telecommunication manager; Pamela Kasten, an elementary assistant at Pine Grove; Thomas Deen, Jr., who was, at all times relevant hereto, the principal at Pine Grove; Bonnie Tyree, a first-grade teacher at Pine Grove; and Heather Martin, Respondent's executive director of Business Services. Petitioner offered Petitioner's Exhibits 1-7, 9-11, 13-26, and 28-30, which were received in evidence. Petitioner's Exhibit 8 was offered, but not received in evidence, and was thereafter proffered.

Respondent did not testify, relying on the written statements that were offered by Petitioner in its case-in-chief. As the statements were offered by Petitioner against Respondent, they are subject to an exception from the hearsay rule as established in section 90.803(18), Florida Statutes. Respondent offered Respondent's Exhibit 1, which was received in evidence.

A one-volume Transcript of the hearing was filed on July 23, 2015. Petitioner and Respondent timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013). Thus, references to statutes are to Florida Statutes (2014), unless otherwise noted.

#### FINDINGS OF FACT

1. Petitioner is the constitutional entity authorized to operate, control, and supervise the system of public schools in Hernando County, Florida. Art. IX, § 4(b), Fla. Const.; § 1001.32, Fla. Stat. Petitioner has the authority to discipline instructional staff and other school employees. § 1012.22(1)(f), Fla. Stat.

2. Respondent has been a teacher at Pine Grove for roughly 11 years. During the 2014-2015 school year, Respondent was a teacher of first-grade students, with a class of approximately 18 students.

3. As a classroom teacher, Respondent was expected to comply with the 2014-2015 Staff Handbook. Among the provisions applicable to Respondent was the following:

## **TOUCHING STUDENTS**

Employees are advised that they should not touch students in any way except for the protection of the health, safety and/or welfare of a student or for protection of themselves.

4. Respondent has been the subject of several disciplinary proceedings over the years.

5. In September 2004, Respondent was involved in an employee conference for grabbing a student's arm on two occasions to correct misbehaviors, the result of which appeared to be a reprimand. The report of the employee conference was to remain in the school file for one year.

6. In January 2006, Respondent was involved in an employee conference for making derogatory comments regarding a student and allowing classmates to do the same. Respondent was required to re-read the Code of Ethics and Professional Practice forms and write a letter of apology to the student and parents. The employee conference report closed with "[a]ny further behaviors involving embarrassment to students will result in further disciplinary action."

7. In September 2013, Respondent was involved in an incident that is of more direct relevance to this proceeding. In that instance, Respondent was accused of roughly handling students in her classroom. As a result, she was offered, and

accepted, a Stipulation for Employee Discipline and Last Chance Agreement (Stipulation).

8. In the Stipulation, Respondent acknowledged that she "engaged in misconduct by having inappropriate and unprofessional interactions with students in her classroom" and that such conduct "warrants disciplinary action up to and including termination."

9. In lieu of termination, the School Board and Respondent agreed that she would be suspended for ten days and, thereafter, serve a probationary period for the remainder of the 2013-2014 school year. The Stipulation further provided that Respondent "agrees that she will not engage in the conduct which gave rise to this Stipulation at any time or any place so long as she is an employee of the Hernando County School District. Further, [Respondent] understands that if she does engage in misconduct, it will result in disciplinary action, up to and including termination."

10. Respondent successfully completed the terms of her probation without incident.

11. School principals, assistant principals, guidance counselors, and persons in similar duties are trained in Crisis Prevention Intervention (CPI), which is an approved method of restraining or transporting completely out-of-control students or removing children from the classroom.

12. CPI training is not provided as a matter of course to classroom teachers. Respondent has not received CPI training.

13. Holding a student's hand is not a CPI hold. There is nothing inherently inappropriate with a teacher taking a student by the hand and walking with the student.

14. The 2014-2015 Staff Handbook provides, in the section entitled "Return of Students to Classroom (Authority of the Teacher)," that:

Teachers should follow their school's procedure for the removal of students who are acting out. Suggestions include: having an adult accompany the student from the class or requesting an administrator to come to the class. (emphasis added).

15. The routine procedure for removal of a disruptive or unruly student from the classroom is for the classroom teacher to call the office, whereupon Ms. Johnson, Ms. Kasten, or a guidance counselor, each of whom are trained in CPI, would go to the room, try to calm the student, and, if warranted, take the student to the office.

16. Despite the procedure described above, Ms. Kasten testified that teachers, on occasion, "would bring the student down for me to talk to or the guidance counselor to talk to." In such instances, "[t]hey would just walk them down" to the office. Although the teacher would usually call the office first, the evidence did not support a finding that a call was

required or necessary, or that it happened in each event. Although the timing of those other events of taking students to the office was described as generally occurring "during their planning period or whatever, if they were at specials or whatever," the preponderance of the evidence supports a finding that the act of walking a student to the office, *per se*, does not constitute a violation of the Code of Ethics, the Principles of Professional Conduct, or the School Board Staff Handbook and that the school has not previously determined it to be so.

17. Among the reasons for having teachers call the office for assistance with disruptive students is to limit those periods in which a teacher may leave students unattended or, as in this case, leave a co-teacher responsible for up to 36 students while the disruptive student was walked to the office. However, Ms. Tyree testified that there have been times when she would ask Respondent to "keep an eye on [her] class" while she went to attend to other things, and vice versa. There was no suggestion that asking a co-teacher to watch over a class was improper, as long as "your class is covered."

18. In the weeks prior to February 4, 2015, J.S., a student in Respondent's classroom, had become increasingly disruptive in the classroom. The behaviors ranged from J.S. talking in "baby-talk" and rolling crayons on his desk, to choking another student with a lanyard. Respondent did not know



why J.S.'s behavior had spiraled out of control, but indicated to Ms. Kasten that it was creating a problem for her ability not only to teach J.S., but to teach the other students in her classroom.

19. The office was called on three occasions to deal with J.S., and Ms. Kasten went to the class to address the situations. On two occasions, J.S. remained in the classroom after Ms. Kasten's intervention. On one occasion, Ms. Kasten removed J.S. from the classroom.

20. On the occasion when Ms. Kasten removed him from Respondent's classroom, J.S. was walking around the room and disturbing the other students. Ms. Kasten could not get J.S. to listen to her. Thus, she decided to take J.S. to the office. She did not employ her CPI training or use a CPI hold, but took him by the hand "with the idea of keeping him from getting away." During the walk to the office, J.S. "was pulling a little bit" to try and get away.<sup>1/</sup> There was no suggestion that the actions of Ms. Kasten in taking J.S. by the hand and walking him to the office were inappropriate or contrary to the Code of Ethics, the Principles of Professional Conduct, or the School Board Staff Handbook.

21. On the afternoon of February 3, 2015, Ms. Kasten met with Respondent to discuss the behavior of J.S. in her classroom. Respondent was upset and frustrated with J.S.'s

unruly behavior and wanted to know what could be done about it. Ms. Kasten suggested that the two of them could work to develop a behavior plan for J.S. and indicated that she would bring a plan to Respondent the next day for them to work on.

22. The incident that forms the basis of this proceeding occurred on February 4, 2015.

23. As students were entering the class for the day, Respondent heard screaming and the words "stop hitting me." She turned and saw J.S. striking a female student with his fists. Respondent was able to verbally quell the disturbance. However, after initially returning to his seat, J.S. went to the back of the room where he began kicking table legs and other items.

24. Respondent asserted that prior to her taking the student to the office, she called Ms. Kasten to advise her that she would be doing so and received permission from Ms. Kasten.

25. Ms. Kasten had no recollection of having received any such call. The telephone records admitted at the hearing do not reflect that any calls were placed between Respondent's line and the office.<sup>2/</sup> There was no evidence to support a finding that the telephone records maintained by the school were unreliable. The greater weight of the evidence indicates that Respondent did not receive prior approval before taking the student to the office on the morning of February 4, 2015. However, the issue of whether Respondent received or did not receive permission to

take J.S. to the office, and whether the act of doing so violated any school policy, was not pled as a basis for Respondent's termination.

26. On her way out of the classroom with J.S., Respondent passed through the classroom of her co-teacher, Ms. Tyree, with whom she shared a paired classroom, and stated to her something to the effect of "[c]an you watch my class? They told me to take [J.S.] to the office." Although not a frequent occurrence, it was not unusual for Respondent and Ms. Tyree, as paired teachers, to watch one another's classes while the other was out for short periods. In this case, Respondent's class was covered while she walked J.S. to the office.

27. Respondent took J.S. by the hand and tucked his arm inside her arm. Although J.S. did not want to go to the office, his resistance was described by Ms. Tyree as "verbal like 'I don't want to go, I don't want to go.' But there wasn't a, like, a tug of war going on there."

28. Respondent indicated that she took J.S. by the hand in order to keep him safe. Given J.S.'s actions of physically assaulting a fellow student, followed by continued physical agitation at the back of the room, Respondent's concern for safety, not only for J.S., but for the other students in her charge, was warranted.

29. The walk to the office was captured by the school's video system. The video covered the time from 8:33:00 to 8:33:58. Respondent and J.S. are clearly visible in the video for approximately 30 seconds, from frame 08:33:04 to frame 08:33:32.

30. The video is somewhat grainy, and certain details are not readily observable. However, the video is consistent with Respondent's statement that she was holding J.S. by the hand. Thus, the preponderance of the evidence supports that Respondent was holding J.S. by the hand as she walked with him to the office and not by the "wrist area," as surmised by Ms. Johnson.

31. At frames 08:33:12 and 08:33:13, J.S. appears to briefly resist Respondent's efforts to take him to the office by trying to remove his hand from Respondent's hand as they walked side-by-side. Despite his resistance, Respondent was not "pulling/dragging" J.S. during those frames.

32. At frames 08:33:18 and 08:33:19, J.S. appears to briefly pull away from Respondent. The action was that of J.S., not of Respondent. Respondent did not release J.S., but neither did she pull or drag J.S.

33. The action at frames 08:33:18 and 08:33:19 is entirely consistent with that described by Ms. Kasten when giving the account of her earlier walk to the office with J.S. -- which did

not involve a CPI hold -- when J.S. "was pulling a little bit" to try and get away.

34. Despite J.S.'s efforts to pull away in both instances, neither Respondent nor Ms. Kasten was "pulling/dragging" J.S. during their walks to the office.

35. For the remainder of the walk to the office, Respondent and J.S. walked side-by-side at a consistent pace. The evidence suggests that J.S. was vocal in his reluctance to be taken to the office, consistent with the description of his verbal resistance when being taken from the classroom as described by Ms. Tyree. The verbal resistance apparently continued, as evidenced by the reaction of the boy using the walker, who comes into the picture at frame 08:33:22. However, J.S.'s verbal protestations did not involve pulling or dragging and do not form the basis of a violation of the Code of Ethics, the Principles of Professional Conduct, or the School Board Staff Handbook.

36. Respondent's actions, though firm, did not appear to be aggressive. They were consistent with the description offered by Ms. Tyree, who testified that, as to the Respondent's walk through her classroom, "there wasn't an altercation of, like, dragging or, you know -- it wasn't -- she was walking, he was walking. But he wasn't happy, you could tell that he didn't want to."

37. As Respondent entered the office with J.S., Ms. Kasten, the elementary assistant, was in the office, though on the other side of the office.

38. Respondent approached the office with J.S. The door to the office opens out. It occasionally slams, and Ms. Kasten has seen it slam on students. In order to ensure J.S.'s safety, Respondent placed both of her hands on his arms to move him through the door and into the office.

39. Respondent yelled for Ms. Kasten to "take him." Ms. Kasten observed that Respondent was trying to get J.S. into the doorway to someone who could help. Although Respondent's calls for Ms. Kasten to take J.S. were loud, her tone of voice was not pled as a basis for Respondent's termination.

40. Upon their entry into the office, Ms. Kasten went over to Respondent and J.S. J.S. stopped resisting once he saw Ms. Kasten. There was no evidence that J.S. was physically harmed in any way, i.e., there were no bruises, scratches, or marks of any kind.

41. Respondent indicated to Ms. Kasten that J.S. had come to class very angry and was physically fighting with his female cousin. Ms. Kasten's contemporaneous statement of the incident indicated that J.S. was "very upset that he had a fight with his sister."<sup>3/</sup> There was no suggestion that J.S. was upset about his walk to the office with Respondent.

42. Ms. Kasten took J.S. off to the side and talked with him. After J.S. calmed down, Ms. Kasten advised Respondent that she would handle the situation from there, and Respondent left the office. J.S. was ultimately kept in the in-school suspension room for an hour or two.

43. Ms. Kasten reported the incident to Ms. Johnson, who was not in her office or out front and did not witness the event.

44. Shortly thereafter, in a conversation regarding other matters, Ms. Johnson reported to Ms. Martin at the District office that Respondent "brought a student in yelling and dragging." Ms. Johnson was instructed to immediately remove Respondent from student contact. Ms. Johnson called to Respondent's classroom and left a message with Respondent that she needed to speak with her.

45. The following day, a meeting was convened to discuss the incident. Present at the meeting were Ms. Johnson, Respondent, and Respondent's union representative. The confidential secretary to the school principal, Mr. Deen, was also in attendance to take minutes of the meeting.

46. During her February 5, 2015, interview regarding the incident, Respondent indicated that "I was keeping him safe. I was holding his hand at first and he was okay. Then he

started pulling away from me and I wanted to make sure he didn't hurt himself." Her statement is consistent with the video.

47. During the meeting, Respondent remained adamant that she had called Ms. Kasten and received the instruction to bring J.S. to the office.

48. In conjunction with the investigation of the incident by Petitioner, Ms. Johnson reported the incident to the Department of Children and Families. The School Board received nothing from the Department of Children and Families to suggest that it found wrongdoing on the part of Respondent.

49. Ms. Johnson believed, based on the information conveyed to her, that there was no reason for Respondent to remove the disruptive student from the classroom and that such action did not follow the protocol for the school for the removal of an unruly student. The alleged breach of protocol involved in taking the child to the office was not pled as a basis for Respondent's termination.

50. On February 18, 2015, Respondent was advised of the opportunity for a pre-determination meeting to be held the following week. Respondent took advantage of the opportunity.

51. The pre-determination meeting was held on February 25, 2015. In attendance were Respondent, Ms. Martin, labor counsel Tom Gonzales, Ms. Johnson, and Joann Hartage, who appeared to be



representing Respondent. Ms. Martin's secretary, Sherrie Kudla, was also in attendance to take minutes of the meeting.

52. During the pre-determination meeting, Respondent gave her account of the incident and was questioned, primarily by Ms. Martin. In addition to questions regarding the walk to the office, Ms. Martin asked about interviews of Respondent's students undertaken by Ms. Johnson, which Ms. Martin found to be "very concerning." Among the issues raised by Ms. Martin was "their perception [] that you yell and get aggravated with students and that you're mean to [J.S]." Although Respondent stated that she had read the statements, she was not involved in the interviews, and had no opportunity to ascertain the accuracy of the statements. More to the point, whether Respondent yelled or was a mean teacher was not pled as a basis for Respondent's termination.

53. At the conclusion of the pre-determination meeting, Ms. Martin conferred with the school superintendent, and the decision was made to recommend to the School Board that Respondent be terminated from employment.

54. By letter dated March 9, 2015, Respondent was advised that, as a result of her "pulling/dragging a student to the front office," the District determined that she had violated rules 6A-10.080(2) and (3), rules 6A-10.81(3)(a) and (3)(e), and the School Board Policy/Staff Handbook; that she was suspended

with pay; and that she had the right to appeal the recommendation of termination.

55. On March 23, 2015, Respondent appealed the recommendation of termination.

56. By letter dated March 24, 2015, Respondent was notified that the recommendation to the School Board would be modified to one of suspension without pay, effective April 22, 2015, and referral of her appeal to the Division of Administrative Hearings.

57. At the April 21, 2015, meeting of the School Board, the School Board authorized that this case be referred to the Division of Administrative Hearings, whereupon this case ensued.

#### Ultimate Findings of Fact

58. Based upon the facts as set forth herein, Petitioner failed to prove, by a preponderance of the evidence, that Respondent engaged in an incident of "pulling/dragging a student to the front office."

59. The preponderance of the evidence supports a finding that Respondent walked J.S. to the office and, despite J.S.'s verbal protestations and brief efforts to resist, did so in a safe and effective manner. Any "pulling" was brief and on the part of J.S., not on the part of Respondent. There was no "dragging."

60. The preponderance of the evidence demonstrates that a teacher's act of walking an unruly or disruptive student to the office is not, in and of itself, a violation of any applicable procedure or standard and has not been determined to be so in the past.

61. The preponderance of the evidence demonstrates that there is nothing inherently inappropriate or improper with a teacher taking a student by the hand and walking with the student.

62. Issues of whether Respondent received telephonic approval to take J.S. to the office, should have left Ms. Tyree to watch her class, spoke to Ms. Kasten in a loud voice, or was loud or mean with her students were not pled as bases for Respondent's termination, and, thus, cannot form the basis for any disciplinary sanction.

#### CONCLUSIONS OF LAW

##### A. Jurisdiction

63. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

##### B. Standards

64. Section 1012.22(1), Florida Statutes, provides, in part, that a district school board shall "[d]esignate positions

to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees . . . , subject to the requirements of [chapter 1012].”

65. Respondent is an employee of Petitioner pursuant to the authority of section 1012.33.

66. Teachers are held to a higher moral standard than others in the community because they are leaders and role models. See Adams v. State Prof'l Practices Council, 406 So. 2d 1170, 1172 (Fla. 1st DCA 1981).

67. Section 1012.33(1)(a) provides that a teacher's contract “shall contain provisions for dismissal during the term of the contract for just cause,” which includes misconduct in office as defined by rule of the State Board of Education.

68. Florida Administrative Code Rule 6A-5.056 establishes the criteria for suspension and dismissal of school personnel. Subsection (2) of the rule provides that:

“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 colleague's ability to effectively perform duties.

69. Rule 6A-10.080, entitled Code of Ethics of the Education Profession in Florida, provides, in pertinent part, that:

(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.

70. Rule 6A-10.081, entitled Principles of Professional Conduct for the Education Profession in Florida, provides, in pertinent part, that:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

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

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

\* \* \*

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

71. School Board Policy 6.301 requires that Petitioner's employees:

[F]amiliarize themselves with the "Code of Ethics of the Education Profession in Florida" and the "Principles of Professional Conduct for the Education Profession in Florida", located in the State Board of Education Rules as well as the code of Ethics set forth in chapter 112 of the Florida Statutes. All employees shall abide by these provisions at all times, and shall be held to them in all matters related to their employment with the Hernando County School Board.

72. Sections of the 2014-2015 School Board Staff Handbook entitled Ethics and Professional Conduct, and Professional Practices and Ethics, likewise require adherence to School Board Policy 6.301 and the state rules referenced therein.

C. The Burden and Standard of Proof

73. Petitioner seeks to terminate Respondent's employment, which does not involve the loss of a license or certification. Thus, Petitioner has the burden of proving the allegations in

its notice of recommendation of termination by a preponderance of the evidence. Cropsey v. Sch. Bd. of Manatee Cnty., 19 So. 3d 351, 355 (Fla. 2d DCA 2009); Cisneros v. Sch. Bd. of Dade Cnty., 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008); McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

74. The preponderance of the evidence standard "is defined as 'the greater weight of the evidence,' Black's Law Dictionary 1201 (7th ed. 1999), or evidence that 'more likely than not' tends to prove a certain proposition." Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000). See also Haines v. Dep't of Child. & Fams., 983 So. 2d 602, 606 (Fla. 5th DCA 2008).

75. The allegations of fact set forth in the charging document are the facts upon which this proceeding is predicated. Once the School Board has delineated the offenses alleged to justify termination in its notice of recommendation of termination, those are the only grounds upon which dismissal may be predicated. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005). See also Klein v. Dep't of Bus. & Prof'l Reg., 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits the School Board from disciplining

a teacher based on matters not specifically alleged in the notice of recommendation of termination. See Pilla v. Sch. Bd. of Dade Cnty., 655 So. 2d 1312, 1314 (Fla. 3d DCA 1995); Texton v. Hancock, 359 So. 2d 895, 897 n.2 (Fla. 1st DCA 1978); see also Sternberg v. Dep't of Prof'l Reg., 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985) ("For the hearing officer and the Board to have then found Dr. Sternberg guilty of an offense with which he was not charged was to deny him due process.").

76. The notice of recommendation of termination alleged that Respondent engaged in an incident of "pulling/dragging a student to the front office." Thus, the scope of this proceeding is properly restricted to those matters as framed by Petitioner. M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

D. Application of the Standards to the Facts

77. Petitioner failed to prove, by a preponderance of the evidence, that Respondent engaged in "pulling/dragging a student to the front office." Rather, the preponderance of the evidence demonstrated that, after J.S. physically struck another student and thereafter continued to act in an agitated and disruptive manner, Respondent took J.S. to the office in a manner designed to ensure the safety of the student, and that did not require specialized training. The preponderance of the evidence further demonstrated that the act of escorting students to the office,



while not common, has been performed by other teachers and that the act of doing so has not heretofore been considered to be a violation of any applicable standard.

78. Petitioner cited to a number of cases in which teacher discipline was upheld, arguing that those cases involved facts comparable to those in this case, thus meriting a comparable outcome. The undersigned has reviewed each of the orders entered in those cases and finds the facts proven in those cases did not approach the conduct alleged -- much less proven -- against Respondent. See Miami-Dade Cnty. Sch. Bd. v. Eaddy, Case No. 14-3006TTS (Fla. DOAH Jan. 15, 2015; Miami-Dade Cnty. Sch. Bd. Feb. 27, 2015) (teacher grabbing a student forcefully by the arm and hitting him -- "three pow-pows" -- on his shoulder with a slapping sound); Duval Cnty. Sch. Bd. v. Hunter, Case No. 12-2080TTS (Fla. DOAH Aug. 14, 2012; Duval Cnty. Sch. Bd. Nov. 15, 2012) (teacher kicking a student into a wall, then picking him up off the floor by his shirt or shoulders, lifting him completely off of the floor, shaking him, and slamming his back against the wall with the student's head hitting the wall and his face held above the teacher's head); Lee Cnty. Sch. Bd. v. Cofield, Case No. 10-1654TTS (Fla. DOAH Sept. 24, 2010; Lee Cnty. Sch. Bd. Nov. 5, 2010) (male teacher placing his hands on a female middle school student's shoulders to prevent her entry into his classroom); Miami-Dade Cnty. Sch. Bd. v. Wagensommer,

Case No. 14-3006TTS (Fla. DOAH Dec. 16, 2008; Miami-Dade Cnty. Sch. Bd. Jan. 27, 2009) (teacher grabbing a student by the hair and pulling him by the arm, hurting him in the process; grabbing other students by their arms to control their behavior; making threats to throw students out of the window if they did not behave; and forcing students to hold heavy, book-filled book bags on top of their heads for an extended period); Miami-Dade Cnty. Sch. Bd. v. Wojcicki, Case No. 01-4247TTS (Fla. DOAH Aug. 14, 2002; Miami-Dade Cnty. Sch. Bd. Sept. 16, 2002) (teacher reaching out and giving a student's arm a shake in order to get the student's attention; scuffling with a student, grabbing and pulling the student's shirt, and bumping the student; and placing his hands on a student's shoulders and giving him "a little push," causing the student to stumble backwards).

79. Petitioner cites to Polk Cnty. Sch. Bd. v. Morales, Case No. 13-3322TTS (Fla. DOAH Jan. 17, 2014; Polk Cnty. Sch. Bd. \_\_\_\_\_), as being "particularly instructive." In that case, the teacher physically dragged an unresponsive student who had "gone limp" along the ground by his arm, leaving the student's shirt scuffed and dirty and the student distraught. The suggestion that the conduct described in Morales even approaches that of Respondent in this case is rejected.

80. The acts warranting discipline in the cases cited by Petitioner as persuasive authority, including Morales, are in no way comparable to the acts at issue in this proceeding.

81. The evidence produced at the hearing does not constitute just cause to terminate the employment of Respondent for misconduct in office.

#### RECOMMENDATION

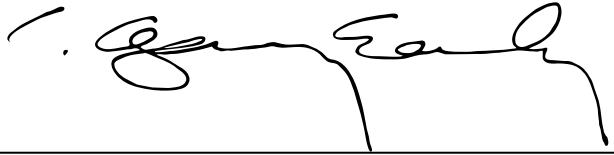
Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Hernando County School Board, enter a final order:

(a) dismissing the March 9, 2015, notice of recommendation of termination;

(b) reinstating Respondent to a position equivalent to that previously held with the Hernando County School Board; and

(c) to the extent there is a statute, rule, employment contract, or collective bargaining agreement that authorizes back pay as a remedy for Respondent's wrongful termination/suspension without pay, Respondent should be awarded full back pay and benefits. See Sch. Bd. of Seminole Cnty. v. Morgan, 582 So. 2d 787, 788 (Fla. 5th DCA 1991); Brooks v. Sch. Bd. of Brevard Cnty., 419 So. 2d 659, 661 (Fla. 5th DCA 1982).

DONE AND ENTERED this 25th day of August, 2015, in  
Tallahassee, Leon County, Florida.



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E. GARY EARLY  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of August, 2015.

ENDNOTES

<sup>1/</sup> On direct examination, Ms. Kasten described the incident as follows:

A: We weren't in a restraint at that point.  
I think I was -- I did take him by the hand.

Q: Okay. And when you say "take him by the  
hand," could you describe that? By that I  
mean what force?

A: Like by the hand.

Q: Were you holding hands --

A: Yeah.

Q: -- with the idea of keeping him from  
getting away from you?

A: Yeah.

Q: Okay. Was he trying to get away from you?

A: He was pulling a little bit, yeah.

Q: All right.

At the conclusion of Ms. Kasten's examination, the undersigned engaged in the following question and answer with Ms. Kasten:

THE COURT: And you said you left -- you walked out with him, took him by the hand. Was that -- when you took him by the hand, to take him -- and you took him back to the office to ISS?

THE WITNESS: Yes.

THE COURT: Okay. Do you consider that act to have been a CPI hold --

THE WITNESS: No.

THE COURT: -- when you took him to the office?

THE WITNESS: No.

At the conclusion of that series of questions, an opportunity to follow up was provided, which elicited the following:

MR. GONZALEZ: When you were holding him by the hand on that occasion, when you took him out of the classroom, did you have to exert any force to prevent him from pulling away?

A: He tried to pull away, but I think I might have even let him go after he got out of the classroom. And then he walked with me the rest of the way.

\* \* \*

BY MR. HERDMAN: When he pulled away, did you exert some fair level of force to keep holding his hand?

A: I didn't -- no, I let go.

Ms. Kasten made no mention of having simply "let go" of J.S., a disruptive and resistant child, until essentially prompted by counsel, with absolutely no suggestion previously that she had done anything other than take J.S. by the hand and walk him to the office. That she would take J.S. by the hand "with the idea of keeping him from getting away" and then just "let go" at the first sign of resistance is simply not credible. Regardless, the testimony of Ms. Kasten provides substantial support for the finding that holding a student's hand while walking with him to the office is not a CPI-required act, nor is it inappropriate student contact.

<sup>2/</sup> Mr. Leftwich testified that in addition to Respondent's extension, he printed call logs for Ms. Tyree's extension and Ms. Kasten's extension. Since Respondent shared an office with Ms. Tyree, it would have more effectively closed the circle if Ms. Tyree's records had been produced, thereby precluding a suggestion that Respondent may, in haste, have simply used the other telephone in the office. In that regard, Mr. Leftwich, when he found that only the single page of Respondent's call log had been offered, stated "I'm sorry, sir, I expected more. I misspoke. I expected more." However, no objection as to a lack of completeness was made, and no inference that Respondent may have called from another telephone in the office shared with Ms. Tyree can be drawn from the document received in evidence.

<sup>3/</sup> Whether J.S.'s act of physically striking a fellow student was directed towards his female cousin, his sister, or some unrelated student, is of no relevance.

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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.