

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 15-6467TTS

MICHELLE WHITCO,

Respondent.

_____ /

RECOMMENDED ORDER

On May 24, 2016, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in West Palm Beach and Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are whether Petitioner has just cause to discipline Respondent for restraining a student with disabilities, in violation of Petitioner's policy 5.181(4) (a), (4) (b) (iv), and (6) (d) (iii) (A), and, if so, whether Petitioner may depart from progressive discipline and impose a one-day suspension, as provided by the Collective Bargaining Agreement Between Petitioner and The Palm Beach County Classroom Teachers Association (CBA).

PRELIMINARY STATEMENT

On October 14, 2015, Petitioner's superintendent issued a Notice of One-Day Suspension Without Pay (Notice). The Notice states that the superintendent will recommend that Petitioner suspend Respondent for one day without pay at the special school board meeting on November 4, 2015. The Notice states that an investigation substantiated charges that Respondent had violated various rules and policies requiring the safeguarding of students, exercising of best professional judgment, and following policies, rules and directives.

By Petition dated November 17, 2015, Petitioner alleges that Petitioner hired Respondent in 2006, and Respondent has not been disciplined previously. At all material times, she allegedly taught an exceptional student education (ESE) class. In June 2015, Respondent allegedly restrained Student 10 by

attaching a bungee cord from the legs of his chair to an adjacent table. The Petition also alleges that Respondent placed Student 11 in a bean bag chair with the sides turned up so that he could recompose himself without being distracted by other students or an LCD screen.

The Notice alleges that Respondent thus violated sections 1012.22(1)(f) and 1012.27(5), Florida Statutes; policies 1.013 and 3.27; CBA article II, section M; and Florida Administrative Code Rule 6A-5.056. The Notice seeks a final order imposing a one-day suspension without pay.

Respondent timely requested a hearing.

At the hearing, Petitioner called nine witnesses and offered into evidence 21 exhibits: Petitioner Exhibits 2 (pages 12 through 24), 3, 5, 6, 16 through 24, and 30 through 37. Respondent called three witnesses and offered into evidence five exhibits: Respondent Exhibits 1 through 5. All of the exhibits were admitted into evidence except for Petitioner Exhibits 14 and 15, which were excluded and proffered. At the hearing, the Administrative Law Judge advised that he would take official notice of the CBA and Petitioner's policies, which are available online.

The court reporter filed the transcript on July 20, 2016. The parties filed proposed recommended orders on August 5, 2016.

FINDINGS OF FACT

1. Respondent is a certified ESE teacher and has taught ESE classes for 12 years. Since 2012, Respondent has taught at Royal Palm School, which is an ESE center operated by Petitioner for students ranging in age from 3 to 22 years. During the 2014-15 school year, as well as summer school of 2015, Respondent taught a K-1 class of mostly five- and six-year-olds in an intellectual disabilities class.

2. At the start of the 2014-15 school year, Respondent's classroom consisted of 12 ESE students, although Respondent's class, by the end of the school year, consisted of 11 students and, in summer school, 9 students. At the start of the school year, the principal assigned two aides to Respondent's classroom.

3. The students' disabilities were varied. Student 10 suffers from Down Syndrome, has deficits in vision and hearing, and was the most cognitively challenged of the students in the class. Student 10 used a "chew toy" for oral stimulation, wore diapers, and required full assistance when eating. He was unaware of danger and required adult supervision at all times, including a curb-to-curb escort on arriving and leaving school. Student 10's delays in cognition, communication, and social/emotional development limited his interactions with adults and peers.

4. Based on his May 2015 IEP, by the end of the school year, Student 10 still could not attend for more than five seconds in response to an adult voice, required hand-over-hand assistance to mark paper, demonstrated no hand dominance, repeatedly grabbed nearby items and placed them into his mouth for oral stimulation, could not maintain eye contact, and (if permitted) wandered about the classroom climbing onto chairs and tables or spinning in continuous circles. He was unable to walk more than 300 feet on uneven surfaces independently without losing his balance and engaged in various behaviors, likely to self-stimulate or to modulate stimulation, including rocking side to side while standing or rocking his chair back and forth while sitting. Student 10 had rocked his chair the prior school year until his teacher placed the chair against a wall, so he could not rock it.

5. Student 11 was aggressive and would slap, kick, bite, spit, and throw things at adults and peers. Another student was blind and defenseless. Student 11 had bitten this student once and had tried to bite him on another occasion, so adults had to ensure that Student 11 could not get at the defenseless student, who had been attacked on two other occasions by other students.

6. Another student suffers from Dandy Walker Syndrome, which involves swelling of the cerebellum due to the collection of intracranial fluids. She is deaf, tends to aspirate her

food, suffers seizures, has limited mobility, and is highly aggressive. Another of the students has a serious liver disorder, so that the consumption of certain foods could be deadly. Although her mother sent food to school every day, the student tried to take other students' food and eat it. She also must be kept from bending over, which may necessitate emergency hospitalization. Another student is developmentally disabled, deaf, and blind. These five students required one-on-one adult supervision as much of the time as adult staff was available to provide it.

7. In addition to Student 10, four other students were diagnosed with Down Syndrome. One of these students was limited to baby food and tried to escape from the classroom every time he approached the door. He also threw things at other students. One of the other students with Down Syndrome is much less mobile, but constantly pushed over chairs.

8. Much time of the adults in Respondent's classroom was spent in toileting. Ten of the students were still in diapers. These students required considerable assistance in the bathroom to avoid accidents that would leave the area soiled with feces. One aide estimated that nine of these students averaged four diaper changes daily; the tenth--the student with the liver condition--required six or seven diaper changes daily. She estimated that an aide would spend an average of three minutes

changing a wet diaper and six minutes changing a soiled diaper, which, she testified, occurred with a high frequency. The aide added that considerably more time was involved if the child's clothing also required changing, but she did not estimate the frequency of this occurrence. Ignoring clothing changes, toileting activities thus consumed at least three hours daily of aide time. Aides were also required to devote one hour daily to hall duty and substantial blocks of time to serving breakfast and assisting with children leaving or entering buses or other transportation. In sum, due to these responsibilities, half of an aide was not available for supervision in the classroom during instruction or transitions.

9. The principal's assignment of two aides to Respondent's classroom was based on Petitioner's policy of one aide per every six ESE students. Although the staffing of Respondent's classroom conformed to Petitioner's staffing policy, at the start of the 2014-15 school year, Petitioner and her two aides were overwhelmed by the needs of their 12 students, prompting Respondent to seek help from her administrators.

10. The principal agreed to provide Respondent relief if the District office approved the creation of another classroom at Royal Palm School. However, the enrollment at the school failed to meet the threshold for the addition of another class. In the alternative, the principal directed other persons,

including an occupational therapist, physical therapist, varying-exceptionalities teacher, deaf-and-hard-of-hearing teacher, speech-language pathologist, and behavior resources teacher, to meet and find a solution for Respondent.

11. The group appointed by the principal met four times in November 2014 to devise a plan to help Respondent with her entire class. The first meeting took place on November 7, 2014, with 13 attendees, including Respondent. Although the principal did not attend the first two meetings, the perspective of the administration was presented by the behavior resources teacher, who led off the meeting by acknowledging that the principal had asked them to identify ways to help Respondent better meet the "safety and needs" of her students using existing staff. Respondent spoke next, stressing the need for "additional staff" and distributing a handout describing her students in general terms.

12. The behavior resources teacher suggested splitting the class in two by allowing aides and "support staff" to use an adjacent, underused room to teach half the class while Respondent taught the other half. Respondent stated that she needed another aide. In addressing a suggestion that an aide might volunteer to help out in Respondent's classroom, one of the existing aides mentioned that the other aides knew of the

problems, such as children removing their clothes and one child playing with his stool, so any aide would have to be assigned.

13. Someone asked if the classroom was set up for "good teaching," and Respondent replied, "yes, but we have serious danger issues." The existing aide noted staffing deficiencies, but the behavior resources teacher answered, "Do the best with the people we have now." The meeting concluded with several persons offering to supervise some of Respondent's students during parts of the day, but a unique aide to one child worrying that she and the nurse would be exposed to potential liability if they were expected to serve the needs of any students besides the single student to whom they were assigned.

14. A few days later, a group of 10 persons reconvened. The minutes of this meeting conclude that all staff was willing to try to help Respondent, there was a "great need for additional help to assist with toileting and general assignments throughout the day," and Respondent continued to insist on additional staff.

15. One week after the first meeting, 14 persons met for a third meeting. This group included Respondent, the principal, and the assistant principal. Attendees addressed the changes that had already been made, including greater use of the adjacent room effectively to reduce the ratio of students to adults in Respondent's classroom. The principal agreed to hire

a third aide. The group discussed that students were overturning furniture and changes were needed to avoid injury to someone. Someone had suggested bigger tables--presumably, too heavy for the students to overturn--and the appropriate person was trying to locate some.

16. The final meeting took place on November 24, 2014, with 13 attendees, including Respondent, the principal, and the assistant principal. A discussion of Student 11 mentioned the proper use of a Rifton chair, which is equipped with a lap belt. The behavior resources teacher emphasized that the chair must be used properly, and the assistant principal added that it may not be used for restraint.

17. The third aide had been assigned to the classroom, and Respondent reported that she had helped a lot. About three weeks later, during the final week of school before winter break, Respondent reported to the behavior resources teacher that the behaviors in her classroom had improved and transitions were proceeding smoothly.

18. Respondent did not elaborate at the hearing on the effect of the behavioral improvements that followed the assignment of a third aide to her classroom toward the end of the first semester of the 2014-15 school year. Clearly, adult time was consumed partly by dealing with maladaptive behaviors, but many of the time-consuming features of the class, as

described above, were not behavioral, at least in the sense of their amenability to dramatic change: for example, the demanding toileting needs of all but two of the students; Student 10's cognitive challenges, unawareness of danger, need for oral stimulation, need for hand-over-hand assistance to mark a paper, and spinning, rocking, and tendencies to climb atop the furniture; and the extraordinary needs of the students with Dandy Walker Syndrome, the liver disorder, and development disability with blindness and deafness.

19. The CBA authorizes discipline of employees for "just cause." CBA, Art. II, § M, ¶ 6. Petitioner is required to impose progressive discipline, which, in ascending order, is a verbal reprimand with a written notation, written reprimand, suspension without pay, and dismissal. CBA, Art. II, § M, ¶ 7. Petitioner is limited to progressive discipline "[e]xcept in cases which clearly constitute a real and immediate danger to the District" or "the actions/inactions of the employee constitute such [sic] clearly flagrant and purposeful violations of reasonable school rules." Id.

20. Petitioner has failed to prove just cause for disciplining Respondent in connection with Student 11. Petitioner failed to prove the material allegations involving Student 11 other than that, when he became overstimulated and unruly, Respondent directed him to sit on a bean bag chair in

the back of the room so that he could recompose himself before returning to his seat. This directive was entirely reasonable, especially given Student 11's above-noted proclivity toward biting and spitting upon his neighbors and staff, including one particularly vulnerable child.

21. The evidence fails to establish that any adult folded up Student 11 "like a taco" in the bean bag chair or directed Student 11 to fold himself up in the chair. It is possible the sides of the chair could have been pulled up to interfere with the occupant's sight line of something that had been distracting him or someone he had been assaulting, but no evidence suggests that pulled-up sides substantially blocked Student 11's view of the room or that the sides would remain pulled up for very long. When giving a statement to Petitioner, Respondent's casual description of her use of the bean bag only underscores that its use was innocuous; this statement did not constitute, as Petitioner contends, a concession of child abuse in an unguarded moment during an intensive interrogation. On this record, the evidence fails to prove that Respondent's use of the bean bag chair was in any way inappropriate, and Student 11 is not further addressed in this recommended order.

22. On the other hand, Petitioner has proved just cause for disciplining Respondent in connection with Student 10. Petitioner proved that, in violation of Petitioner's policy

governing the restraint of ESE students, on several occasions, Respondent attached a bungee cord to the legs of Student 10's chair, stretching the cord around the legs of the table at which Student 10 sat. The cord did not touch Student 10, unless he could reach it with his feet, nor did the cord force the chest or stomach of the child to press against the edge of the table. But tethering the chair to the table prevented Student 10 from pushing his chair back from the table to get out of the chair without assistance from an adult.

23. It is not entirely clear when Respondent first used the bungee cord to restrain Student 10. She applied the bungee cord for not more than one hour at a time when one of the aides was at lunch or unavailable in the classroom due to toileting or other duties that removed her from direct contact with the students, and Student 10 was rocking in his chair, at risk of tipping over. This practice clearly took place after the addition of the third aide to the classroom. At no time did Student 10 acknowledge the presence of the bungee cord or indicate any embarrassment at its use.

24. Respondent's use of the bungee cord was not a means to punish Student 10. Respondent's use of the bungee cord was not for her personal convenience, such as to permit Respondent to escape her instructional and supervisory duties during the school day. Respondent's use of the bungee cord was to protect

Student 10 from tipping over his chair and harming himself while allowing Respondent and the aides to monitor more closely other vulnerable students.

25. Respondent worked hard to obtain help in her classroom, and administrators responded with a third aide. It seems that the additional adult may have helped with the more behavioral problems. But the more intractable issues presented by the students still had to be managed, and Respondent continued to advocate for the needs of her students. At one point during the school year, Student 10's mother gave to Respondent a prescription for occupational therapy, physical therapy, and speech therapy. Respondent delivered this prescription to the school's occupational therapist, who said they would evaluate Student 10, but not until the end of the school year, despite the fact that the child obviously suffered from significant deficits that are properly addressed by occupational therapy.

26. The record provides no support for a departure from progressive discipline. If every violation of the policy restricting the restraint of ESE students justified a departure from progressive discipline, the policy and perhaps the CBA should so provide, but they do not, so it is necessary to analyze the circumstances of Respondent's violation from the perspective of the language of the CBA's departure clause.

27. In general, Petitioner has failed to prove by clear and convincing evidence that Respondent's use of the bungee cord clearly constituted a real and immediate danger to the District. Not a natural person, the District is most obviously jeopardized by legal liability. There is no evidence of the reaction of the mother of Student 10 upon being told of the use of the bungee cord with her son. There is no evidence of any legal action that has been commenced or is likely to be commenced by Student 10's mother, any advocate for disabled students, or any federal or state agency responsible for monitoring compliance with the Individuals with Disabilities Education Act. Investigations by the Department of Children and Families and Petitioner's police were closed without any action.

28. Nor has Petitioner proved by clear and convincing evidence that Respondent's acts and omissions constitute clearly flagrant and purposeful violations of reasonable rules. The reference to "reasonable" rules is puzzling, as though some rules are not reasonable, but, if it must be said, Petitioner's policy restricting the restraint of ESE students is reasonable.

29. Also, Respondent's violation was purposeful. Admitting that she never told any administrator about her use of the bungee cord, Respondent testified that she did not know that her use of the cord violated Petitioner's policy against restraints when applied to ESE students. If Respondent meant

that she was unaware of Petitioner's policy addressing the restraint of ESE students, this testimony is discredited. Even the aides understood that there was a general prohibition against restraining ESE students. Also, during one of the four meetings in November 2014, one or two participants alluded to the policy. Lastly, generous portions of the policy are incorporated in the CBA. If Respondent meant that she was unaware that her use of the bungee cord violated Petitioner's policy, this testimony also is discredited. The purpose of the bungee cord was to restrain Student 11, and the policy broadly restricts the restraint of ESE students.

30. Petitioner thus proved that Respondent's violation was purposeful because she knew of the policy restricting the restraint of ESE students, knew that the bungee cord restrained Student 10's freedom of movement, and knew that her use of the bungee cord violated the policy.

31. The CBA requires, though, that the violation also be flagrant. Flagrant means "conspicuously offensive <flagrant errors>; especially: so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality <flagrant violations of human rights>." <http://www.merriam-webster.com/dictionary/flagrant>.

32. The bungee cord itself was inconspicuous, as it extended a few inches about the floor under a chair and a table

amid a classroom of tables and chairs. No administrator who happened by Respondent's classroom for the several months that the bungee cord was in intermittent use ever noticed it. Other students appeared not to notice the use of the bungee cord, as Student 10 suffered no embarrassment from the use of the bungee cord in this manner.

33. Respondent's use of the bungee cord was not conspicuously offensive. All three aides witnessed Respondent's use of the bungee cord for several months, but said nothing and did not seem to think that the use of the bungee cord presented much, if any, of an issue. The third aide, who had worked only part of the school year, mentioned the bungee cord to the assistant principal, but primarily as support for her complaint that Respondent's summer-school class of nine students could not be served by only two aides. A conspicuously offensive act would have generated more dramatic responses from the aides.

34. Respondent's motivation in using the bungee cord also undermines a finding of flagrancy. As noted above, the class presented serious demands on the four adults. Especially when one or two aides were unavailable due to other duties, the bungee cord kept Student 10 from harming himself and allowed Respondent and the available aide or aides to better serve the other children, as in preventing one from striking a particularly vulnerable child, preventing one from eloping,

and preventing one from bending over or eating others' food, or providing a few extra minutes of direct support to a developmentally disabled child who could neither see nor hear what was going on around him.

35. Respondent's use of the bungee cord did not expose Student 10 to an unreasonable risk of personal harm. An adult could quickly remove him from the tethered chair, probably more quickly than she could remove a child strapped into a Rifton chair. In no way did this restraint pose as much risk as that posed by one or more adults' grasping and holding a child, say, pinned to the ground. Student 10 could not self-evacuate with or without the bungee cord. Whatever theoretical risk of harm was posed by the few seconds that it would take for an adult to push the tethered chair back to allow Student 10 to get out of his chair was more than offset by the gain in safety from stopping the climbing atop furniture and tipping the chair back.

36. When administrators at Royal Palm School learned of Respondent's use of the bungee cord during summer school in 2015, they immediately removed Respondent from her teaching assignment under her summer-school contract, without pay, for the remaining 12 days of summer school. The following year, she was assigned alternative duties that did not involve student contact, but was paid at her regular rate.

CONCLUSIONS OF LAW

37. DOAH has jurisdiction over the subject matter. §§ 120.569, 120.57, and 1012.33(6)(a)2., Fla. Stat. (2015). (All statutory references are to 2015 Florida Statutes.)

38. Petitioner bears the burden of proving the material allegations, typically by a preponderance of the evidence. § 120.57(1)(j); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568 (Fla. 3d DCA 1990) (teacher-dismissal case). However, CBA article II, section M, paragraph 1, requires Petitioner to prove its case by clear and convincing evidence. Clear and convincing evidence must make the facts "highly probable" and produce in the mind of the trier of fact "a firm belief or conviction as to the truth of the facts sought to be established," leaving "no substantial doubt." Slomowitz v. Walker, 429 So. 2d 797, 799 (Fla. 4th DCA 1983).

39. Petitioner may impose discipline if just cause exists. CBA, Art. II, § M, ¶ 1; § 1012.33(1)(a) and (6)(a). Just cause in this case exists due to Respondent's violation of the policy restricting the restraint of ESE students. It is unnecessary to consider whether Respondent's use of the bungee cord may have violated other alleged statutes and rules because the violation of this policy describes Respondent's misconduct most specifically.

40. The policy restricting the use of restraint on ESE students is Petitioner's policy 5.181(k) (ii), which provides:

1. Purpose of Policy. The School Board of Palm Beach County (Board) acknowledges that students, their families, and personnel of the School District of Palm Beach County (District) have serious concerns about the use of seclusion and restraint with students with disabilities. This Policy addresses those serious concerns and underscores that District personnel must always use the least intrusive measures possible under the circumstances to ensure the physical safety and security of students with disabilities, District personnel, and campus visitors.

The use of seclusion is prohibited in Palm Beach County Public Schools. Thus, this Policy defines the limited, emergency circumstances in which staff and school personnel of the District may use physical restraint on students with disabilities, who are eligible under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (Section 504), the Americans with Disabilities Act of 1990 (ADA), and State law.

This Policy seeks to reduce the use of restraint throughout the District while still helping to instill an educational culture that promotes a positive, safe learning environment for students with disabilities and District personnel.

2. General Applicability of Policy.

a. This Policy applies to all District schools, students with disabilities and school-based District personnel.

b. This Policy describes the procedures to be followed in the administration of restraint, required training and

certification, notice to parents, and documentation requirements.

c. Restraint must only be used as a safety measure, within a comprehensive approach to a student's behavioral challenges, including accurate and continuous data related to fidelity of implementation and impact on behavioral outcomes.

d. This Policy does not eliminate or restrict the ability of trained and certified District personnel to use their discretion in the use of restraint to protect students or others from an imminent risk of serious injury or death as provided in this Policy.

* * *

3. Definitions. The following Policy terms are listed in alphabetical order and shall have the meanings expressly assigned to them for the purposes of this policy.

* * *

e. "Imminent risk of serious injury or death" means an immediate, high probability of significant injury to a student or others, such as a laceration, bone fracture, hematoma, bruise, injury to internal organs, or similar serious bodily injury.

* * *

k. "Restraint" means any method used to involuntarily limit a student's freedom of movement, including, but not limited to, bodily physical force in the least amount necessary to prevent a student from harming self or others. Restraint may be used only by District staff trained in the appropriate use of restraint.

* * *

ii. "Mechanical restraint" means the use of any device, material or equipment to restrict a student's freedom of movement. The use of mechanical restraints in the District is prohibited. Examples of prohibited mechanical restraints include, but are not limited to: belts, vests, helmets, padded mittens, tie-downs, wraps and chairs with straps, seatbelts, blanket wrapping, harnesses, tape and trays.

A. Exceptions: The prohibition against mechanical restraint does not include devices implemented by trained school personnel or devices used by a student that have been prescribed by an appropriate medical or related service professionals and are used for the specific, approved purposes for which such devices were designed, such as:

I. Adaptive devices or mechanical supports used to achieve proper body position, balance, or alignment to allow greater freedom of mobility than would be possible without the use of such devices or mechanical supports, except that these exceptions to the definition of mechanical restraint do not apply to any device when it is used for any purpose other than supporting a body position or proper balance, such as when used as coercion, discipline, convenience, or retaliation, to prevent imminent risk of serious injury or death of the student or others, or for any other behavior management reason;

* * *

4. Statement of Policy. The School Board recognizes its responsibility to ensure that all students are treated with respect and dignity in an environment that provides for the physical safety and security of all students, District personnel and campus visitors. In accordance with state law, the School Board seeks to ensure that physical

restraint is administered on students with disabilities consistent with this Policy. Thus, District personnel are authorized to physically restrain students with disabilities only in the limited situations as provided in this Policy.

a. Administered By Trained District Personnel. Without exception, restraint decisions must be made by trained and certified District personnel, who will ensure that each restraint event is performed safely, for the least amount of time necessary, with an emphasis on de-escalation of potentially dangerous incidents, and affording the minimum risk to the student, classmates, teachers, and staff.

b. Prohibitions. As more specifically described in Section 6 of this Policy, the School Board hereby prohibits:

* * *

ii. The use of restraint for the purposes of discipline, punishment, or convenience.

* * *

iv. The use of mechanical restraints on any student.

* * *

5. Use of Restraint.

a. Assessment of Need for Restraint. District personnel trained in District-approved restraint methods must determine, by evaluating each individual circumstance, whether restraint is appropriate, based on assessment of whether an emergency, where an imminent risk of serious injury or death to the student or others, exists.

* * *

6. Prohibited Actions.

* * *

b. Restraint must never be used:

* * *

ii. As punishment, for the convenience of staff, or as a substitute for a Functional Behavior Assessment (FBA) and an individualized Behavioral Intervention Program (BIP).

* * *

vi. For more time than the absolute minimum time necessary.

* * *

d. Specific prohibited actions include, but are not limited to:

* * *

iii. Use of any mechanical restraint, such as belts, vests, helmets, padded mittens, tie-downs, wraps and chairs with straps, seatbelts, blanket wrapping, harnesses, tape and trays, unless:

A. The mechanical restraint has been prescribed by an appropriate medical or related service professional and is used for the specific, approved purposes for which such devices were designed.

* * *

D. The restraint is orthopedically prescribed devices that permit a student to participate in activities without risk of harm.

E. It is medical protective equipment.

F. It is physical equipment or orthopedic appliances, surgical dressings or bandages, or supportive body bands or other restraints necessary for medical treatment, which is ongoing in the educational setting.

7. Notification, Documentation and Reporting.

a. Initial Notification to and Acknowledgement of Parent. The principal or designee shall notify parents or legal guardians each time physical restraint is used. Such notification must be in writing and provided before the end of the school day on which the restraint occurred. Reasonable efforts must also be taken to notify the parents or guardians by telephone or computer e-mail (or both) and those efforts must be documented. The principal or designee shall obtain, and keep in school records parents' or guardians' signed acknowledgment that they were notified of their child's restraint.

b. Incident Report of Used Restraint. In compliance with Section 1003.573, Florida Statutes, the principal or designee shall prepare an incident report within twenty-four (24) hours after a student is released from restraint. If the student's release occurs on a day before the school closes for the weekend, a holiday, or another reason, the incident report must be completed by the end of the school day on the day the school reopens. The incident report shall be completed on the FLDOE web-based reporting and a copy to the parent/guardian as required by subparagraph (c) herein. Each incident report must include the following information:

i. The name of the student restrained;

ii. The date and time of the event and the duration of the restraint;

iii. The location at which the restraint occurred;

iv. The type of restraint used;

v. The name of the person using or assisting in the restraint of the student;

vi. The name of any non-student who witnessed the restraint;

vii. A description of the incident, including:

A. The context in which the restraint occurred.

B. The student's behavior leading up to and precipitating the decision to use manual physical restraint, including an indication as to why there was an imminent risk of serious injury or death to the student or others.

C. The specific positive behavioral strategies used to prevent and deescalate the behavior.

D. What occurred with the student immediately after the restraint terminated.

E. Any injuries, visible marks, or possible medical emergencies that may have occurred during the restraint, documented according to District policies.

F. Evidence of steps taken to notify the student's parent or guardian.

* * *

c. Incident Report to Parent. The principal or designee shall provide parents with the completed incident report by mail

within three (3) school days after a student was physically restrained. Schools shall obtain, and maintain in a secure location, parents' signed acknowledgment that they received a copy of the incident report. Schools will mail the completed incident report to parents, including a self-addressed stamped envelope for parents to return the signature page to school.

8. Training and Certification of District Staff.

a. Responsibilities for Training and Certification. The Superintendent or designee shall ensure the District has instituted a training and certification program, including refresher certification, designed to address the use of restraint with students with disabilities, consistent with standards provided by FLDOE. . . .

b. Training and Certification Program Consistent with Guidelines of FLDOE, the District-approved restraint training methodology shall include, but not be limited to:

i. Procedures for deescalating problem behaviors before they increase to a level or intensity necessitating physical intervention.

ii. Information regarding the risks associated with physical restraint, as well as procedures for assessing individual situations and students, in order to determine if the use of restraint is appropriate and sufficiently safe.

iii. The actual use of specific techniques that ranges from the least to most restrictive, with ample opportunity for trainees to demonstrate hands-on proficiency in their use.

iv. Techniques for implementing physical restraint, with multiple staff members working as a team.

v. Techniques for assisting a student to reenter the instructional environment and again engage in learning.

vi. Instruction in the District's documentation and reporting requirements.

vii. Procedures to identify and effectively respond to potential medical emergencies arising during the use of restraint.

c. Maintenance and Reporting of Training and Certification. The District must maintain records identifying the name and position of each person trained and certified; the date of the most recent certification or training; an indication of whether it was an initial certification or training or a refresher certification or training; and whether the individual successfully completed the certification or training and achieved proficiency. . . .

d. Maintenance of Certification by Staff. Current certifications must be maintained by all District staff who have successfully completed the initial restraint training program. . . .

9. Monitoring.

a. In compliance with Section 1003.573, Florida Statutes:

i. The District must undertake comprehensive monitoring of the use of restraint on students at the school classroom, building, District, and State levels.

ii. Each month that the District's schools are in session, all required

restraint documentation will be made accessible via a web-based reporting system to school principals, the District's Director of ESE, and the Bureau Chief of the Bureau of Exceptional Education and Student Services.

b. District-level administrators are responsible for regular oversight and data analysis of all restraint events. The ESE Director or designee will monitor the restraints that have been reported by District, school and classroom level.

c. If there are more than three (3) restraints occurring on one student within a one (1)-month period, an IEP or 504 Team must convene to consider development or review of a Functional Behavior Assessment (FBA) and an individual Behavior Intervention Plan (BIP). Where there are more than three (3) restraints occurring during a school year, the IEP or 504 Team must address the frequency and duration of the restraints.

d. If there are more than five (5) restraints occurring during a one (1)-month period at an individual school, the ESE Director or designee will contact the school principal and monitor whether there are any particular teachers and/or staff members in need of additional behavioral intervention and/or support.

e. If there are more than ten (10) restraints occurring at an individual school in the course of a school year, the Program Planner for Autism and E/BD programs or designee will visit the school and provide technical assistance. At any time, a principal may request support from the ESE Department's behavior team.

f. All documentation regarding a restraint is maintained in the student's confidential file.

g. The School District shall develop a plan to reduce the length of time and occurrence of restraint within Palm Beach County public schools. This plan will be developed with stakeholders in the school community, including parents, advocates and employees.

h. The ESE Department will provide quarterly reports to the School Board and Superintendent so that restraints can be carefully monitored.

i. Any revisions to this Policy must be filed with the State's Bureau Chief of the Bureau of Exceptional Education and Student Services.

10. Plans and Programs.

a. This Policy does not modify, interfere with, or substitute for the District's non-delegable responsibility under Federal and State law to identify, evaluate, and address the specific, individualized behavioral needs of children with disabilities.

b. Where appropriate, this Policy permits a student's educational and behavioral plans to include the use of restraint in specified emergency situations.

11. Policy Interpretation.

a. This Policy shall be interpreted to comply with all Federal and State laws, regulations, rules and guidance, with particular attention to Section 1003.573, Florida Statutes, and the Technical Assistance Paper issued by the Florida Department of Education, Division of Public Schools, Bureau of Exceptional Education and Student Services ("Guidelines for the Use, Documentation, Reporting, and Monitoring of Seclusion and Restraint with Students with Disabilities").

* * *

41. This policy is a comprehensive statement that assures disabled students and their parents that restraint will not assume paramount importance in Petitioner's plan for educating ESE students whose behaviors interfere with their or their peers' education. Restraint may be used as a safety measure, but only within a comprehensive approach to managing a child's behavior, and mechanical restraints, such as belts, tie-downs, and straps, must be prescribed by an appropriate medical or related-service professional, such as an occupational therapist.

42. Respondent clearly failed to conform to the promises that Petitioner has made to parents in this detailed policy. Her failure likely would qualify as flagrant if her classroom were adequately staffed and if Petitioner had adequately responded to the needs of Student 10 by providing for his special needs. As noted above, though, Student 10 arrived in Respondent's classroom without his most basic need--occupational therapy--addressed in his IEP, even though he could not feed himself, grasp a crayon or pencil and make a mark on a piece of paper, or toilet himself. Respondent's attempt mid-year to obtain occupational therapy for Student 10 was ignored. The occupational therapist could have ordered limited restraint of Student 10 or detailed alternative measures to be taken when he engaged in chair-tipping or furniture-climbing.

43. Nor did Student 10 arrive in Respondent's classroom with a behavior intervention plan, which could address both volitional and nonvolitional behaviors of the child. During the November 24, 2014, meeting, the behavior resources teacher explained his failure to enter the classroom to address the behavior of Student 11. The behavior resources teacher said that he was "coming up with a behavior plan," but Student 11 was "silly & I don't come now because it's a reward," meaning a reinforcement of disruptive behavior. The behavior resources teacher added that, "everyone that comes in, [Student 11] thinks they are there for him." The principal intervened at this point, saying only that everyone needed to work on the behavior plan. Compared to Student 10, Student 11's behaviors appear to have been more amenable to management through a behavior intervention plan, so it is understandable that Respondent did not press the administration for a behavior intervention plan for Student 10 at least until she got one for Student 11.

44. Petitioner's policy assumes that the behavior of a challenging student, such as Student 10, will be addressed comprehensively through a behavior intervention plan and an occupational therapist will apply her expertise to determine the extent, if any, to which mechanical restraints may be applied. Under these circumstances, a teacher's violation of Petitioner's policy restricting the restraint of ESE students may be

flagrant; under the present circumstances, Respondent's violation of this policy is not. Respondent unilaterally superseded this carefully crafted document with her own simplistic determination of when and how to restrain an ESE student without any notice to his parents, documentation, or monitoring, but the issue here is whether the CBA's departure clause has been triggered.

45. It is not clear whether the oddly worded departure clause is intended itself to depart from the more common phrasing of a departure clause, which is based simply on the severity of the employee's misconduct. See, e.g., Quiller v. Duval Cnty. Sch. Bd., 171 So. 3d 745 (Fla. 1st DCA 2015) ("some more severe acts of misconduct may warrant circumventing the established procedure"). But the same result obtains, whether assessing the flagrancy of Respondent's misconduct or the severity of her misconduct. Either way, Petitioner has failed to prove by clear and convincing evidence a basis for departing from the bargained-for promise of progressive discipline contained in the CBA.

46. Respondent contends in her proposed recommended order that she is entitled to back pay for the 12 days of work that she missed during summer school after Petitioner removed her from the classroom. Respondent claims back pay, not merely if Petitioner were unable to establish just cause, but even if, as

here, Petitioner established just cause, but failed to justify a departure from progressive discipline. The prerequisite to an award of back pay is prevailing on the underlying just-cause charge, not on the measure of the discipline. § 1012.33(6)(a) ("if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid"). (emphasis added). As alleged, the charge was that Respondent violated the policy restricting the restraint of ESE students, and the discipline was a one-day suspension. Respondent's loss of 12 days' pay is damnum absque injuria. Cf. Geico Gen. Ins. Co. v. Hoy, 136 So. 3d 647 (Fla. 2d DCA 2013).

RECOMMENDATION

It is

RECOMMENDED that Petitioner enter a final order finding just cause for disciplining Respondent for a violation of Petitioner's policy 5.181(k)(ii) in connection with the restraint of Student 10, issuing a verbal reprimand with a written notation instead of the proposed one-day's suspension, and denying Respondent's claim for back pay.

DONE AND ENTERED this 16th day of August, 2016, in
Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.