

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF
EDUCATION,

Petitioner,

vs.

Case No. 16-3077PL

KENNETH ATKINSON,

Respondent.

_____ /

RECOMMENDED ORDER

This case was heard on September 14, 2016, by video teleconference at locations in Tallahassee and Pensacola, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: J. David Holder, Esquire
J. David Holder, P.A.
387 Lakeside Drive
Defuniak Springs, Florida 32435

For Respondent: Ronald G. Stowers, Esquire
Levine and Stivers, LLC
245 East Virginia Street
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STATEMENT OF THE ISSUES

Whether Respondent violated section 1012.795(1)(j), Florida Statutes, and Florida Administrative Code Rule 6A-10.081(3)(a),

as alleged in the Administrative Complaint and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On February 12, 2016, the Commissioner of Education executed an Administrative Complaint against Respondent which alleged that, "[o]n or about March 6, 2014, Respondent made an inappropriate and upsetting comment in front of his class and disclosed confidential medical information of T.L., a fourteen-year-old female student. During a discussion on diabetes, Respondent stated to the class, 'Your pancreas can die and you could go into sugar shock; go into a coma and die, like (T.L.) could,' or words to that effect."

On March 7, 2016, Respondent timely filed an election of rights by which he requested a formal hearing. The matter was referred to the Division of Administrative Hearings for an evidentiary hearing.

The hearing was scheduled for August 2, 2016. Upon motion, and for good cause shown, the hearing was continued until September 14, 2016.

On September 8, 2016, the parties filed their Joint Statement of Stipulated Facts, which contained seven stipulations of fact, each of which is adopted and incorporated herein.

The final hearing was convened on September 14, 2016, as scheduled. At the final hearing, Petitioner presented the testimony of E.O., C.P., and C.B., who were students in Respondent's class at the time of the alleged incident; Sharon Patrick, who was, at the time of the alleged incident, principal of Sims Middle School (Sims Middle); Ryan Stokes, assistant principal of Sims Middle; and Connie Carnley, who was, at the time of the alleged incident, director of Employee Evaluations and Compliance and Accountability for the Santa Rosa County School District. Ms. Patrick and Mr. Stokes also testified in rebuttal. Petitioner's Exhibits 1, 9 through 11, 15 through 18, 24, 30, and 31 were received into evidence. Petitioner's Exhibit 1 is a summary of student interviews conducted by Mr. Stokes. No one was in attendance other than the student being interviewed and Mr. Stokes. The investigative summary is almost entirely hearsay upon hearsay and has been given little evidentiary weight, except as the information may be used for a purpose other than proving the truth of the matters asserted.

In his case-in-chief, Respondent testified on his own behalf. Respondent's Exhibits 1 and 3 were received in evidence.^{1/}

At the conclusion of the day's proceedings, the record was held open to allow for the filing of the testimony of the

complaining student, T.L., and her mother, and of the responsive testimony of Respondent.

A one-volume Transcript of the September 14, 2016, proceedings was filed on October 3, 2016.

The deposition testimony of T.L. and her mother was filed on October 26, 2016. Respondent's deposition testimony was filed on November 7, 2016, whereupon the record was closed. The deposition transcripts have been accepted in lieu of live testimony, and have been given the evidentiary weight as if the deponents offered their testimony at the final hearing.

The parties having requested 20 days from the date of the last filed deposition transcript for filing post-hearing submittals, November 28, 2016, was established as the date for filing proposed recommended orders.

Both parties timely filed Proposed Recommended Orders which have been duly considered by the undersigned in the preparation of this Recommended Order.

The actions that form the basis for the Administrative Complaint occurred in March 2014. 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). Accordingly, all statutory and regulatory references are to their 2013 version, unless otherwise specified.

FINDINGS OF FACT

1. The Florida Education Practices Commission is the state agency charged with the duty and responsibility to revoke or suspend, or take other appropriate action with regard to teaching certificates as provided in sections 1012.795 and 1012.796, Florida Statutes (2016). § 1012.79(7), Fla. Stat.

2. Petitioner, as Commissioner of Education, is charged with the duty to file and prosecute administrative complaints against individuals who hold Florida teaching certificates and who are alleged to have violated standards of teacher conduct. § 1012.796(6), Fla. Stat.

3. Respondent holds Florida Educator's Certificate 962539, covering the areas of English, English for Speakers of Other Languages, Middle Grades Integrated Curriculum, and Reading, which is valid through June 30, 2017. During the 2013-2014 school year, Respondent was employed as a science teacher at Sims Middle. He continued teaching at Sims Middle for the 2014-2015 school year, and currently teaches at Woodham Middle School in Escambia County.

4. Among his teaching assignments, Respondent taught an eighth-grade honors science class during the school day's first period. Among his students in that class was T.L.

5. T.L had, in 2010, been diagnosed with Type I diabetes. By her eighth-grade year, T.L. was an "independent diabetic,"

using an insulin pump and capable of carrying her meter and lancing device with her.

6. On March 6, 2014, during a discussion of the consequences of the failure of various organs, Respondent made a comment that was substantially similar to that alleged in the Administrative Complaint, i.e., "Your pancreas can die and you could go into sugar shock; go into a coma and die, like (T.L.) could." Respondent was standing in front of T.L.'s desk at the time. His position meant that the students were, or should have had their attention directed to Respondent. Thus, his statement would have been obvious.

7. The investigation performed by Mr. Stokes indicated that comments similar to that involving T.L. "are often made" by Respondent; that T.L. likely took the statement "the wrong way" due to Respondent's "dry sense of humor"; that Respondent "often makes comments trying to be funny but it usually just makes people feel weird"; and that he has made similar comments regarding other students in the past. The statements contained in Mr. Stokes' report are not accepted for the truth of the matters asserted, but are used herein as evidence of Respondent's overly loose and unsuccessfully "funny" teaching style.

8. The statements contained in Mr. Stokes' report also support a finding, made herein, that Respondent did not single

T.L. out for disparate treatment, but (misguidedly) used her condition, with benign intent, to reinforce the importance of his lesson plan. In that regard, even T.L.'s mother, who was aggravated by the incident, admitted that the instruction as to what can happen when one's pancreas dies "would have been appropriate in the classroom," with her concern being the personalization of the instruction. However, she acknowledged that Respondent's "unprofessional" comments had previously been directed to other students, and were not restricted to T.L.

9. The evidence suggests that T.L.'s diabetic condition was not unknown. T.L.'s close circle of friends knew, having been told by T.L. C.P. testified that T.L.'s diabetes was fairly common knowledge. On at least one occasion prior to Respondent's statement, the alarm on T.L.'s insulin pump went off during class. Respondent asked the class whether the sound was a cell phone, to which T.L. replied "Oh, that is my pump, sorry," and turned the alarm off. T.L. carried the pump in her pocket, and she testified that the other students "probably just thought I had something weird in my pocket, but didn't really know what it was." T.L.'s mother testified that "her tubing was usually visible, depending on what she was wearing." Finally, the topic of T.L.'s award-winning science project was the effect of contaminants at the site of a finger stick when testing one's blood for glucose. While there was no evidence that T.L.'s

diabetes was the subject of a general announcement, or that it was a topic of particular concern amongst her peers, the preponderance of the evidence indicates that it was unlikely that her condition was unknown to those in her class.

10. The comment that forms the basis for the Administrative Complaint, though related to the class lesson plan, was inappropriate and unnecessary. Despite the fact that T.L.'s diabetes was not unknown to her peers, Respondent's act of using her as an example was embarrassing to her.

11. Respondent's testimony that his use of T.L. as an example of an unchecked diabetic reaction was purely happenstance is not plausible. The evidence is convincing that Respondent was well aware of T.L.'s diabetes, and used her as an example of someone who had the condition that was the topic of discussion. However, there was no evidence that Respondent made the statement maliciously, or with the intent to embarrass or humiliate T.L.

12. Prior to the incident in question, T.L., along with other students, used her telephone with Respondent's permission in his class after completing Florida Writes testing, and Snapchatted a video to a friend. That became known when the friend asked Respondent why students in her later class period could not use their phones in similar circumstances. Respondent verbally admonished both T.L. and her friend, with his primary

concern seeming to be that he could get in trouble for having allowed his first-period students to use their phones in class. T.L. was not written up for the incident, and there was no adverse effect on her grades.

13. On March 5, 2014, Respondent received a letter of reprimand from Sims Middle regarding the incident of allowing students to use telephones in class. Although the incident that forms the basis for the Administrative Complaint occurred on March 6, 2014, there is insufficient evidence to establish a causal connection between the two. The suggestion that the incident in question was retaliation, or was otherwise precipitated by the Snapchat incident, is not accepted.

14. On March 28, 2014, Respondent received a letter of reprimand from Sims Middle for the incident in question. Other than the two reprimands described herein, both having been issued in the span of little more than three weeks, he had not been the subject of any previous disciplinary actions during his eleven-year period of employment with the Santa Rosa County School District.

15. There was no evidence that T.L.'s mental health was actually affected by the incident. The testimony of T.L. and her mother is evidence that she was, and remains, a bright, articulate, well-adjusted, straight-A student. However, rule 6A-10.081(3)(a) "does not require evidence that Respondent

actually harmed [T.L.]'s health or safety. Rather, it requires a showing that Respondent failed to make reasonable efforts to protect the student from such harm." Gerard Robinson, as Comm'r of Educ. vs. William Randall Aydelott, Case No. 12-0621PL ¶ 76 (Fla. DOAH Aug. 29, 2012; EPC Dec. 19, 2012). Under the circumstances described herein, Petitioner proved that Respondent, though without specific intent or malice, failed to make reasonable effort to protect T.L. from embarrassment, a condition reasonably contemplated to be harmful to her mental health pursuant to rule 6A-10.081(3)(a).

CONCLUSIONS OF LAW

A. Jurisdiction

16. 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 (2016).

B. Standards

17. Section 1012.795(1), which establishes the violations that subject a holder of an educator certificate to disciplinary sanctions, provides, in pertinent part, that:

(1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for up to 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring

direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for up to 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon an order of the court or notice by the Department of Revenue relating to the payment of child support; or may impose any other penalty provided by law, if the person:

* * *

(j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

18. Rule 6A-10.081(3)(a)^{2/} provides that:

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.

C. Burden and Standard of Proof

19. Petitioner bears the burden of proving the specific allegations of wrongdoing that support the charges alleged in the Administrative Complaint by clear and convincing evidence

before disciplinary action may be taken against the professional license of a teacher. Tenbroeck v. Castor, 640 So. 2d 164, 167 (Fla. 1st DCA 1994); § 120.57(1)(j), Fla. Stat.; see also Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins. and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

20. 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). The clear and convincing evidence level of proof

[E]ntails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such 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 Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

21. Section 1012.795 is penal in nature and must be strictly construed, with any ambiguity construed against Petitioner. Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden the application of such statutes. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997); see also Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

22. The allegations set forth in the Administrative Complaint are those upon which this proceeding is predicated. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); see also Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits the imposition of disciplinary sanctions based on matters not specifically alleged in the notice of charges. 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."). Thus, the scope of this proceeding is properly restricted to those issues of fact and law as framed by Petitioner. M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

D. Counts 1 and 2 - Section 1012.795(1)(j) and Rule 6A-10.081(3)(a)

23. Count 1 of the Administrative Complaint charged Respondent with violating section 1012.795(1)(j) by having violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education Rules. Thus, Count 1 does not constitute an independent violation, but rather is dependent upon a corresponding violation of the rules constituting the Principles of Professional Conduct.

24. Count 2 of the Administrative Complaint charged Respondent with violating rule 6A-10.081(3)(a) by failing to make reasonable effort to protect his students from conditions harmful to learning, to their mental or physical health, or to their safety.

25. The evidence in this case demonstrates that Respondent inadvisably used T.L. as an example in a classroom discussion of a topic reasonably related to Respondent's lesson plan. As found herein, there was no competent, substantial, or persuasive evidence to demonstrate that the statement was the result of malice or retribution, and no evidence that it was made with the intent to embarrass or humiliate T.L. Nonetheless, the statement was careless, and unnecessarily led to T.L.'s embarrassment. As such, Respondent failed to make reasonable effort to protect T.L. from a condition reasonably contemplated to be harmful to her mental health in violation of rule 6A-10.081(3)(a).

E. Penalty

26. Florida Administrative Code Rule 6B-11.007(2) establishes the range of penalties for violations of various statutory and regulatory provisions as follows:

(2) The following disciplinary guidelines shall apply to violations of the below listed statutory and rule violations and to the described actions which may be basis for determining violations of particular statutory or rule provisions. Each of the following disciplinary guidelines shall be interpreted to include "probation," "Recovery Network Program," "letter of reprimand," "restrict scope of practice," "fine," and "administrative fees and/or costs" with applicable terms thereof as additional penalty provisions. The terms "suspension" and "revocation" shall mean any length of suspension or revocation,

including permanent revocation, permitted by statute, and shall include a comparable period of denial of an application for an educator's certificate.

27. Section 1012.795(1)(j) is not one of the specific statutory provisions listed in the penalty guidelines. Rather, it is incorporated in rule 6B-11.007(2)(j), as among the "[o]ther violations of Section 1012.795, F.S.," with a guideline penalty of "Probation - Revocation or such penalty as is required by statute."^{3/}

28. Rule 6B-11.007(2)(i)16. lists a guideline penalty of "Probation - Revocation" for "[f]ailure to protect or supervise students" in violation of rule 6A-10.081(3)(a).^{4/}

29. Rule 6B-11.007(3) establishes aggravating and mitigating factors to be applied to penalties calculated under the guidelines.

30. The facts of this case demonstrate that there are no aggravating factors. The following mitigating factors exist:

Rule 6B-11.007(3)(a) - The severity of the offense, being an uncalculated but careless error, was very mild;

Rule 6B-11.007(3)(b) - There was no danger to the public;

Rule 6B-11.007(3)(c) - There were no repetitions;

Rule 6B-11.007(3)(e) - Respondent has never before been subject to discipline by the Commission;

Rule 6B-11.007(3) (f) - Respondent is in his 12th year of teaching;

Rule 6B-11.007(3) (g) and (r) - Given the lack of any effect on T.L.'s academic advancement, and her continued progress as an "excellent student," there was no actual damage, physical or otherwise, caused by the violation, and no actual mental harm.

RECOMMENDATION

Upon consideration of the Findings of Fact and Conclusions of Law reached herein, it is RECOMMENDED that the Education Practices Commission enter a final order finding that Respondent violated rule 6A-10.081(3) (a). It is further recommended that Respondent be issued a reprimand.

DONE AND ENTERED this 7th day of December, 2016, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of December, 2016.

ENDNOTES

^{1/} Respondent's Exhibit 4 was identified (Tr. 125:14-22) but was not moved into evidence. Thus, it is not part of the record of this proceeding.

^{2/} The gravamen of this case is almost entirely dependent upon the embarrassment experienced by T.L. as a result of Respondent's careless use of her condition as an example. Why Petitioner did not allege a violation of rule 6A-10.081(3)(e), which makes it a violation to "intentionally expose a student to unnecessary embarrassment or disparagement," was not explained. Nonetheless, that provision was not pled and cannot form the basis of either a violation or a penalty in this case.

^{3/} It should be noted that numerous serious infractions have the same penalty guideline range of "Probation-Revocation" as does the generic "other" category, including: obtaining or attempting to obtain a Florida educator's certificate by fraudulent means; being incompetent to teach or to perform duties as an educator; being guilty of gross immorality or an act involving moral turpitude; engaging in personal conduct which seriously reduces effectiveness as a district school board employee; misappropriation of money; using a position for personal gain; sexual misconduct; alcohol or drug-related offenses; possession of controlled substances; improperly assisting a student with standardized testing; engaging in inappropriate electronic communications, transmissions, or downloads involving gambling; and failing to report child abuse. Each of these listed infractions is far more serious than the minor incident in this case, one taken with no intent to embarrass or humiliate the student.

In addition to the foregoing, other far more serious infractions than the one proven here include a reprimand within the recommended penalty, including: committing criminal misdemeanors; misuse of corporal punishment; harassment or discrimination of students on the basis of race, color, religion, sex, age, origin, political beliefs, handicap, sexual orientation, or family status; harassment or discrimination which interferes with an individual's performance or work; and improperly assisting a student with testing.

In short, the effort to establish a "catch-all" category for all unlisted violations, with a penalty range of "Probation-Revocation," has in this case resulted in a guideline that is disproportionate to the nature and severity of the offense.

^{4/} Rule 6A-10.081 was transferred from Florida Administrative Code Rule 6B-1.006 on January 11, 2013. As will be discussed herein, the penalty guidelines rule continues to cite to rule 6B-1.006 in setting penalty ranges. Rule 6A-10.081(3)(a) is substantively identical to the last iteration of rule 6B-1.006(3)(a). Since the facts alleged and the text of the rule allegedly violated were clear for Count 2, and since there is no evidence that Respondent was misled or harmed by the citation in the penalty guidelines to a rule that is no longer in effect as numbered, the penalty guideline in rule 6B-11.007(2)(i)16. shall be applied to the violation of rule 6A-10.081(3)(a).

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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.