

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF  
EDUCATION,

Petitioner,

vs.

Case No. 16-4600PL

ROBIN WELCH KENNEDY,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 19 and 25, 2016, in Jacksonville, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Ron Weaver, Esquire  
Post Office Box 770088  
Ocala, Florida 34477-0088

For Respondent: Harold S. Lippes, Esquire  
Lippes & Bryan, P.A.  
700 Ponte Vedra Lakes Boulevard  
Ponte Vedra Beach, Florida 32082

STATEMENT OF THE ISSUES

Whether Respondent violated section 1012.795(1)(g) and (j), Florida Statutes (2013),<sup>1/</sup> and Florida Administrative Code Rule 6A-10.081(3)(a) and (e), while in a classroom at Neptune Beach

Elementary School on September 19, 2013, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On July 16, 2015, Petitioner, Pam Stewart as Commissioner of Education, filed an Administrative Complaint charging Respondent, Robin Welch Kennedy ("Respondent" or "Ms. Kennedy") with violating section 1012.795(1)(g) and (j) and rule 6A-10.081(3)(a) and (e). Ms. Kennedy disputed the allegations in the Administrative Complaint and requested a formal administrative hearing. On August 15, 2016, the case was referred to DOAH for assignment of an administrative law judge ("ALJ"), and ALJ E. Gary Early scheduled the final hearing to occur on October 19, 2016, by video teleconference between Jacksonville and Tallahassee, Florida.

On October 11, 2016, Petitioner filed a "Request for Official Recognition" asking ALJ Early to officially recognize a news article and television report regarding arrests of Ms. Kennedy. ALJ Early denied the Request for Official Recognition via an Order issued on October 13, 2016. However, ALJ Early stated that his denial was without prejudice to Petitioner seeking to have the news article and video admitted into evidence through some other means.

On October 18, 2016, Ms. Kennedy's attorney filed a Motion requesting that the final hearing be continued due to a death in

his family. After convening the final hearing as scheduled, ALJ Early considered the aforementioned Motion to Continue and issued an Order on October 19, 2016, continuing the final hearing to October 25, 2016. In addition, ALJ Early specified that the re-scheduled final hearing would be conducted as a live hearing in Jacksonville rather than as a video teleconference hearing.

On October 24, 2016, this case was transferred to the undersigned, and the final hearing was held as scheduled on October 25, 2016.

During the final hearing, the undersigned accepted Petitioner's Exhibits 2 through 5, 7, 11, and 13 into evidence. Petitioner presented the testimony of C.J., R.B., Elizabeth Kavanaugh, Amber Rodenkirch, Kathleen Meyer, and Ivy Johnson. C.J. and R.B. are minors, and the undersigned will refer to them herein by their initials in order to protect their privacy.

Petitioner renewed her request that a news article regarding arrests of Ms. Kennedy be admitted into evidence. The undersigned denied the renewed request but specified that Petitioner could file a motion for reconsideration directing the undersigned to relevant authorities.

No motion for reconsideration was forthcoming after the final hearing, and the previous denial is reaffirmed. In doing so, the undersigned concludes that the relevance of the

information within the news article to the allegations at issue is questionable at best. See generally § 120.569(2)(g), Fla. Stat. (providing that “[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida.”). Moreover, to whatever event that the information at issue is relevant, the potential for unfair prejudice outweighs any probative value. See § 90.403 (providing that “[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.”). But see State v. Burrell, 772 N.W.2d 459, 467 (Minn. 2009) (stating that “[t]he distinction between a jury trial and a bench trial is important. The risk of unfair prejudice to Burrell is reduced because there is comparatively less risk that the district court judge, as compared to a jury of laypersons, would use the evidence for an improper purpose or have his sense of reason overcome by emotion.”).

Ms. Kennedy offered no exhibits and testified on her own behalf.

Petitioner ordered a transcript and filed a timely Proposed Recommended Order on Friday, November 18, 2016. The undersigned

considered Petitioner's Proposed Recommended Order in the preparation of this Recommended Order.

DOAH's computerized filing system notes that Ms. Kennedy's attorney filed a Proposed Recommended Order at 8:00 a.m. on Monday, November 21, 2016. Due to a lack of prejudice to Petitioner and because it is possible that Ms. Kennedy's Proposed Recommended Order was timely filed prior to the close of business on Friday, November 18, 2016, the undersigned also considered Ms. Kennedy's Proposed Recommended Order in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based on the demeanor of the witnesses, the documentary evidence presented, and the record as a whole, the following facts are found:

1. The Florida Education Practices Commission ("the 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. § 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. At all times relevant to the instant case, Ms. Kennedy held Florida Educator Certificate 889874, covering the areas of Elementary Education and English for Speakers of Other Languages. Ms. Kennedy's certificate is valid through June 30, 2017.

4. Ms. Kennedy began her teaching career in 2001 after graduating with a bachelor's degree in Elementary Education from the University of North Florida.

5. The school district assigned Ms. Kennedy to Neptune Beach Elementary on September 9, 2013, approximately two weeks into the 2013-2014 school year.

6. The principal of Neptune Beach Elementary, Elizabeth Kavanagh, then assigned Ms. Kennedy to a third-grade class being taught by Ms. Amber Rodenkirch. It is unclear whether the two teachers were equals in the classroom or if Ms. Rodenkirch gave direction to Ms. Kennedy.

7. The students in Ms. Rodenkirch and Ms. Kennedy's class ("the class") sat at tables rather than in chairs with a writing surface attached thereto.

8. As illustrated by Petitioner's Exhibit 13, the chairs utilized by the students were of two types. One type consisted of a plastic seat resting on metal tubes. The metal tubes had four flat ends making contact with the floor. The second type of chair also consisted of a plastic seat resting on metal

tubes. However, the second type of chair made contact with the floor by having two metal tubes lying flat on the floor. As a result, it would be much easier to slide the second type of chair along a carpeted floor than the first.

9. When seated in the second type of chair, the children in the class would often lean forward. By doing so, they would cause the back portion of the metal tubes on which the seat rested to rise up off the floor.

10. When working with a student, Ms. Rodenkirch and Ms. Kennedy would be standing behind or next to a seated student. If that student was seated in the second type of chair and leaning forward, there was a tendency for the metal tubes on which the seat rested to come down on a teacher's foot once the student leaned or sat back in his or her chair.

11. Because it was painful for a chair to come down on her feet, Ms. Kennedy greatly preferred the first type of chair to the second.

12. On September 19, 2013, Ms. Kennedy had recently been in a surfing accident which left one of her feet black and blue. In all likelihood, Ms. Kennedy was particularly concerned that day with the children leaning forward in their chairs.

13. On September 19, 2013, Ms. Rodenkirch was working with a student and was 10 to 14 feet away from Ms. Kennedy. A

student, C.J., was leaning forward in his chair, and Ms. Rodenkirch witnessed Ms. Kennedy tip C.J. out of his chair.

14. After getting up from the floor, C.J. sat back down in his chair and appeared to be startled.

15. Ms. Rodenkirch asked Ms. Kennedy if C.J. fell out of his chair, and Ms. Kennedy responded by stating, "With a little help."

16. Ms. Rodenkirch interpreted that statement as confirmation that Ms. Kennedy intentionally tipped C.J. out of his chair.

17. At a different time on September 19, 2013, Ms. Rodenkirch was again about 10 to 14 feet from Ms. Kennedy when she witnessed Ms. Kennedy tip another student, N.B., out of his chair.

18. As was the case with C.J., N.B. fell to the floor and was startled.

19. Ms. Rodenkirch did not say anything to Ms. Kennedy after witnessing the incident with N.B. However, she was very upset about what she witnessed that day and reported what she saw to Ms. Kavanaugh after the children left school.

20. After hearing Ms. Rodenkirch's description of what happened in the class earlier that day, Ms. Kavanaugh called her supervisor, the regional superintendant, and requested direction.



21. The regional superintendant, Kelly Coker-Daniels, instructed Ms. Kavanaugh to contact the Department of Children and Families and the local school district's investigative branch.

22. Both of the aforementioned entities conducted investigations. The local school district concluded that there was "substantial evidence to sustain the charges of **exercise of poor judgment and inappropriate physical contact with students** against Robin Kennedy for her role in these incidents."

(emphasis in original). Based on the investigation conducted by the Department of Children and Families, the Duval County Public School System: (a) issued a letter of reprimand to Ms. Kennedy; and (b) notified her that, pending approval by the school board, she would be suspended for 15 consecutive working days without pay.

23. Because of the events described above, the parents of C.J. and N.B. requested that their children be transferred to another third-grade class. At least one other student transferred to a different class because she was worried that Ms. Kennedy would pull a chair out from under her.

24. During the final hearing in this matter, Ms. Kennedy denied ever intentionally doing anything that could injure a student. During cross-examination, she responded affirmatively

when asked if Ms. Rodenkirch was lying when she testified that she saw Ms. Kennedy tip C.J. and N.B. out of their chairs.

25. However, the undersigned finds that Ms. Rodenkirch was a much more credible and persuasive witness than Ms. Kennedy.

26. Therefore, the undersigned credits Ms. Rodenkirch's testimony and finds that Ms. Kennedy did tip over the chairs of C.J. and N.B. on September 19, 2013, at Neptune Beach Elementary.

27. Without a doubt, tipping students out of their chairs reduced Ms. Kennedy's effectiveness as a teacher. That is underscored by the fact that students were transferred to other third-grade classes due to Ms. Kennedy's actions.

28. Ms. Kennedy's conduct demonstrates that she failed to make reasonable efforts to protect her students from mental and/or physical harm. While it is very fortunate that none of the students in the class suffered any serious physical injuries, that might not have been the case if a student had hit his or her head on a hard object after being tipped out of his or her chair.

29. Also, it is obvious that tipping a student out of his or her chair could expose that student to unnecessary embarrassment or disparagement.

30. Accordingly, Petitioner has proven by clear and convincing evidence that Ms. Kennedy violated section 1012.795(1)(g) and (j) and rule 6A-10.081(3)(a) and (e).

CONCLUSIONS OF LAW

31. DOAH has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2016).

32. The Commission is the state agency charged with the certification and regulation of Florida educators pursuant to chapter 1012.

33. This is a proceeding in which Petitioner seeks to impose discipline against Respondent's educator certification. Because disciplinary proceedings are considered to be penal in nature, Petitioner is required to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

34. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Florida Supreme Court:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); See also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1991).

35. Section 1012.796 describes the disciplinary process for educators and provides in pertinent part:

- (6) Upon the finding of probable cause, the commissioner shall file a formal complaint and prosecute the complaint pursuant to the provisions of chapter 120. An administrative law judge shall be assigned by the Division of Administrative Hearings of the Department of Management Services to hear the complaint if there are disputed issues of material fact. The administrative law judge shall make recommendations in accordance with the provisions of subsection (7) to the appropriate Education Practices Commission panel which shall conduct a formal review of such recommendations and other pertinent information and

issue a final order. The commission shall consult with its legal counsel prior to issuance of a final order.

- (7) A panel of the commission shall enter a final order either dismissing the complaint or imposing one or more of the following penalties:
  - (a) Denial of an application for a teaching certificate or for an administrative or supervisory endorsement on a teaching certificate. The denial may provide that the applicant may not reapply for certification, and that the department may refuse to consider that applicant's application, for a specified period of time or permanently.
  - (b) Revocation or suspension of a certificate.
  - (c) Imposition of an administrative fine not to exceed \$2,000 for each count or separate offense.
  - (d) Placement of the teacher, administrator, or supervisor on probation for a period of time and subject to such conditions as the commission may specify, including requiring the certified teacher, administrator, or supervisor to complete additional appropriate college courses or work with another certified educator, with the administrative costs of monitoring the probation assessed to the educator placed on probation . . . .
  - (e) Restriction of the authorized scope of practice of the teacher, administrator, or supervisor.
  - (f) Reprimand of the teacher, administrator, or supervisor in

writing, with a copy to be placed in the certification file of such person.

- (g) Imposition of an administrative sanction, upon a person whose teaching certificate has expired, for an act or acts committed while that person possessed a teaching certificate or an expired certificate subject to late renewal, which sanction bars that person from applying for a new certificate for a period of 10 years or less, or permanently.
- (h) Refer the teacher, administrator, or supervisor to the recovery network program provided in section 1012.798 under such terms and conditions as the commission may specify.

36. Petitioner's Administrative Complaint alleges in Count 1 that Ms. Kennedy violated section 1012.795(1)(g), which subjects a holder of an educator certificate to discipline if he or she "has been found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of the district school board." As found above, tipping students out of their chairs undoubtedly reduced Ms. Kennedy's effectiveness as a teacher. Students were transferred from the class due to Ms. Kennedy's actions. Accordingly, Petitioner proved Count 1 by clear and convincing evidence.

37. Count 2 of the Administrative Complaint alleges that Ms. Kennedy violated section 1012.795(1)(j), which subjects a holder of an educator certificate to discipline for violating

"the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules." Those Principles are set forth in rule 6A-10.081.

38. Count 3 alleged that Ms. Kennedy violated rule 6A-10.081(3)(a) by failing to "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."

39. Count 4 alleged that Ms. Kennedy violated rule 6A-10.081(3)(e) by intentionally exposing "a student to unnecessary embarrassment or disparagement."

40. Petitioner proved the allegations in Counts 2, 3, and 4, by clear and convincing evidence. As found above, Ms. Kennedy's conduct demonstrates that she failed to make reasonable efforts to protect her students from mental and/or physical harm, and it is very fortunate that none of the students in the class suffered any serious physical injuries due to her actions. Moreover, tipping a student out of his or her chair obviously exposes that student to unnecessary embarrassment or disparagement.

41. The State Board of Education has adopted Florida Administrative Code Rule 6B-11.007 to provide certificate holders with notice of what penalties can be expected for violations of section 1012.795 and the Principles of Professional Conduct.

42. Petitioner is seeking a 12-month suspension of Ms. Kennedy's educator certificate.

43. Rule 6B-11.007(2)(f)<sup>2/</sup> provided penalties ranging from probation to revocation for a violation of section 1012.795(1)(g). The same penalty range applied for violations of rule 6A-10.081(3)(a) and (e). See Fla. Admin. Code R. 6B-11.007(2)(i)22.

44. Given the circumstances of the instant case and the applicable penalty ranges, a 12-month suspension is appropriate.

45. Furthermore, there are no mitigating factors sufficiently compelling or credible to persuade the undersigned that a lesser penalty should be imposed.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a final order suspending Robin Welch-Kennedy's educator's certificate for 12 months.



DONE AND ENTERED this 5th day of December, 2016, in  
Tallahassee, Leon County, Florida.

*Garnett Chisenhall*

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G. W. CHISENHALL  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of December, 2016.

ENDNOTES

<sup>1/</sup> Unless stated otherwise, all statutory references will be to the 2013 version of the Florida Statutes. That was the version in effect when the conduct at issue occurred and applies to the instant case. Likewise, all references to the Florida Administrative Code will be to the version of the rules in effect when the conduct at issue occurred. See Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992) (agreeing with the appellant's argument that he could not "be found guilty of violating statutes effective in 1986 by virtue of conduct occurring in 1984 and 1985.").

<sup>2/</sup> The applicable version of rule 6B-11.007(2)(f) refers to section 1012.795(1)(f) as subjecting a teacher to discipline for "[e]ngaging in personal conduct which seriously reduces effectiveness as a district school board employee." The rule should be referring to section 1012.795(1)(g), which subjected a teacher to discipline for being "found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of the district school board."

COPIES FURNISHED:

Gretchen K. Brantley, Executive Director  
Education Practices Commission  
Department of Education  
Turlington Building, Suite 316  
325 West Gaines Street  
Tallahassee, Florida 32399-0400  
(eServed)

Ron Weaver, Esquire  
Post Office Box 770088  
Ocala, Florida 34477-0088  
(eServed)

Harold S. Lippes, Esquire  
Lippes & Bryan, P.A.  
700 Ponte Vedra Lakes Boulevard  
Ponte Vedra Beach, Florida 32082  
(eServed)

Matthew Mears, General Counsel  
Department of Education  
Turlington Building, Suite 1244  
325 West Gaines Street  
Tallahassee, Florida 32399-0400  
(eServed)

Marian Lambeth, Bureau Chief  
Bureau of Professional Practices Services  
Department of Education  
Turlington Building, Suite 224-E  
325 West Gaines Street  
Tallahassee, Florida 32399-0400  
(eServed)

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.