STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF EDUCATION,

Petitioner,

vs. Case No. 17-0798PL

GARY SCHRADE,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on May 3, 2017, in DeLand, Florida, before E. Gary Early, a designated administrative law judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ron Weaver, Esquire
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For Respondent: Eric J. Lindstrom, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent violated section 1012.795(1)(j), Florida Statutes, and Florida Administrative Code Rules 6A-10.081(2)(a)1. and 6A-10.081(2)(a)5., as alleged in the Administrative Complaint; and, if so, the appropriate penalty.

## PRELIMINARY STATEMENT

On November 29, 2016, the Commissioner of Education executed an Administrative Complaint against Respondent which alleged that, "[o]n or about November 30, 2015, during class, Respondent postured himself in an aggressive or threatening manner toward eighth grade student, H.H., and stated to H.H., 'come on you little pussy ass bitch, hit me, so I can send your ass to jail,' or words to that effect." As such, Petitioner alleged that Respondent "failed to make reasonable effort to protect [H.H.] from conditions harmful to learning and/or [H.H.]'s mental health and/or physical health and/or safety," and "intentionally exposed [H.H.] to unnecessary embarrassment or disparagement."

On January 9, 2017, Respondent, through counsel, filed an Election of Rights by which he requested a formal hearing.[1/] The matter was referred to the Division of Administrative Hearings for an evidentiary hearing.

The hearing was set for May 3, 2017, and was convened as scheduled.

On April 24, 2017, the parties filed their Joint Pre-hearing Statement, which contained several stipulations of fact, each of which is adopted and incorporated herein.

At the final hearing, Petitioner presented the testimony of Brian Goddard, the Exceptional Student Education (ESE) assistant

principal at DeLand Middle School (DMS); H.H., who was a student in Respondent's class at the time of the alleged incident; T.H., who was a student in a nearby classroom at the time of the alleged incident; Rhonda Gillis-Parker, a campus advisor at DMS; and Sandy Hovis, Director of Professional Standards for Volusia County Schools. Petitioner offered no exhibits into evidence.

In his case in chief, Respondent testified on his own behalf, and presented the testimony of Thomas Robinson, a teacher in the Self-contained Emotionally Behaviorally Disabled (SC-EBD) department at DMS. Respondent's Exhibit 1 was received in evidence.

A one-volume Transcript of the proceedings was filed on May 18, 2017.

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 November 2015. 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 2015 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. (2016).

3. Respondent holds Florida Educator's Certificate 471010, covering the areas of Educational Leadership, Social Science, and Exceptional Student Education, which is valid through June 30, 2019.

4. Prior to the 2015-2016 school year, Respondent had been a school teacher for 27 years, 24 in Georgia, and three in Hawaii. He has never had his teaching certificate disciplined before the instant case.

5. After the 2014-2015 school year, Respondent moved from Hawaii to DeLand to be near his elderly parents.

6. At all times pertinent hereto, Respondent was employed as an ESE teacher at DMS in the SC-EBD student department.

7. As the name infers, the SC-EBD department is self-contained, with EBD students being entirely segregated from the general student population. The SC-EBD department is located in a four-classroom building at DMS. The four classrooms are interconnected. The classrooms of Respondent and Mr. Robinson adjoined at their back doors. The SC-EBD program has approximately 15 total students, with a student-to-staff ratio of three to one. Students rotate through the three classrooms dedicated to the SC-EBD department in two-period blocks, and Mr. Robinson was very familiar with Respondent's classroom and the students.

8. SC-EBD students have a wide range of emotional and behavioral disabilities. The SC-EBD department is the most restrictive environment into which students can be legally placed in the school system, due in part to students in the department having been continuously disruptive in the general student classrooms. To qualify for the department, the student "behaviors have got to be significant. They cannot be your typical misbehavior."

9. According to Mr. Robinson, whose testimony is credited, positions in the SC-EBD department are not desirable, and experience high turnover. Mr. Robinson, having taught EBD students for 19 years -- an anomaly -- has learned to navigate the EBD environment over the years. However, given the severity

of the EBD students' behavioral issues, even Mr. Robinson, with his years of experience and hard-earned student rapport, has "lost his cool" with them.

10. The 2015-2016 school year started in late August 2015. The classroom position ultimately filled by Respondent was vacant, the previous year's teacher having left on short notice. From the beginning of the school year until Respondent was hired, the class was staffed by a mix of substitutes and paraprofessionals. As a result, the class was significantly more unruly and disruptive than normal, with students acting out, and their behaviors escalating and becoming more severe.

11. Prior to his being hired at DMS, Respondent had no experience with EBD settings or with any other kind of severe special education setting, a fact known to Mr. Goddard.

12. Respondent began teaching a SC-EBD class at DMS on September 14, 2015. Mr. Robinson credibly testified that Respondent was placed in an extremely difficult position. EBD students generally do not accept change well, and do not accept authority figures. From the beginning of the year until Respondent was hired, classroom management rules had not been consistently enforced by the substitutes and paraprofessionals assigned to the class. When Respondent was thrown into the classroom, and began enforcing the rules, the students got out

of sorts, and began to buck the change and Respondent's authority. Referral of students for disciplinary reasons was not uncommon.

13. Respondent received CPI training, and STARTS program training, which included training in Odyssey.[2/] The 12 required hours of non-crisis CPI intervention training is normally provided over a two-day workshop. Eighty-five percent of the training is de-escalation training as to how to deal with students that become out of control. The rest is for restraint training, i.e. "actual hand-to-hand," and for post-incident therapeutic rapport. STARTS training is a four-day program conducted on Saturdays, and is usually done before the start of the school year. It includes a half-day of overview, content-specific training for EBD students, two half-days of classroom management for EBD, and one full day of instruction on the EBD curriculum. Given the timeframes for receiving training, it would appear that Respondent's training would not have concluded until well into October.

14. Although Mr. Goddard testified that a district EBD program specialist visited the campus once a week, DMS created no formal or informal mentorship program, and Mr. Goddard did not have specifics as to any special support. Mr. Goddard testified that he did rely on Mr. Robinson, who was "very much

the helpful hand in terms of training and teaching the teachers in their -- the program, as well as the paraprofessionals."

15. Student H.H. was well known to the DMS administration, with frequent situations in which administration had to deal with him for hyperactivity, profanity, and physical contact with other students. Mr. Goddard knew him to be easily provoked. Mr. Goddard further testified that, as to negatively confrontational situations with H.H., "most staff and students that's -- that was the reaction. I can't remember specifically any moment in time it was [Respondent] directly, but I'm sure it was within his classroom. . . . It was multiple settings for H.H." As stated by T.H., "[H.H.] just gets upset for the most simplest things."

16. Students H.H. and L.Y. were "a very toxic combination." They "would perform for one another to kind of one up each other," and their negative behaviors could be "inflamed" by one another. Both students had probation officers and were in and out of the juvenile justice system. There had been discussion at both the EBD level and the administrative level that H.H. and L.Y. should not be paired in the same classroom, with agreement that they should be separated "at all costs" to avoid potential flare-ups.

17. Prior to November 30, 2015, and despite the recognition that they should not be in class together, H.H. and

L.Y. were removed from their elective classes due to their behaviors and "their inability to be in a gen-ed setting," and were placed together in Respondent's classroom during seventh period, which was Respondent's EBD sixth-grade world history class.

18. Both Mr. Robinson and Mr. Goddard indicated that H.H. had expressed the desire to see that Respondent got fired, though Mr. Goddard testified that "H.H. probably says that about every staff member on DeLand Middle School's campus, including myself."

19. On November 30, 2015, H.H. and L.Y. arrived late to Respondent's classroom. The testimony from various witnesses as to the subsequent events was inconsistent and contradictory in several major areas.

H.H.'s Version of Events

20. H.H. testified that L.Y. and Respondent had an earlier confrontation,[3/] witnessed by H.H., and that L.Y. "was already out of the classroom" before any interaction between H.H. and Respondent. H.H.'s testimony was confirmed by Respondent, who testified that "where L.Y. was at that time, I do not know. He had gone already."

21. H.H. testified that after L.Y. left the classroom,[4/] he was sitting, working on the computer, and asked Ms. Lord, the paraprofessional in Respondent's classroom who was "sitting,

like, maybe, two chairs away from me," to help him with a quiz. At that time, he testified that Respondent became angry with him talking to Ms. Lord.[5/] H.H. testified that Respondent "got into my face" and yelled at him. Other than the vague statement that Respondent got into his face, H.H. offered no support for a finding that Respondent was "posturing." H.H. and Respondent had an exchange, whereupon H.H. walked out of the door, during which H.H. testified that Respondent hit him with his shoulder.

22. After he was outside, H.H. testified that Respondent "poked his head out and he was just, like, Pussy-ass bitch." H.H. testified that Ms. Gillis-Parker was by the door when he walked out of the classroom, and was within a few feet of him when Respondent made his alleged "pussy-ass bitch" statement. H.H. returned, and stood blocking the door. His full body was inside, but he did not go "all the way in the classroom." He testified that he was ready to fight Respondent. H.H. then testified that Respondent "said something about [H.H.'s] mother."[6/] H.H. was "fittin' to, like, to try to, like, fight him," when Ms. Parker-Gillis grabbed him and told him to leave and go to the office.

T.H.'s Version of Events

23. T.H., who was in another EBD classroom, testified that H.H. had gone to the classroom door, and "kind of" nicely asked, "in a normal voice," to go to the main office.[7/] He testified

that Respondent "said no," whereupon H.H. walked out. He stated that Respondent then went to the door and said "Come back here you fucking pussy." Despite T.H.'s apparent ability to see Respondent's classroom door, and to hear conversation made in a normal voice, he described no other statements or actions related to the incident.

Ms. Gillis-Parker's Version of Events

24. Ms. Gillis-Parker described a scene very different from any of the main actors. She testified that, at sometime after 3:00 p.m., she was returning to the campus after opening the gate to the school fence to allow buses to come in. She then heard a teacher yelling "pussy-ass kid." At that point, "the foot went heavier on the golf cart," and she rolled up to Respondent's classroom.

25. When she arrived, Ms. Gillis-Parker claimed that, as the door to the classroom was "slinging open" (implying that it was closed when she first came on the scene), she heard "dirty ass bitch" and could clearly see through the crack at the hinge end of the outward-opening door that Respondent was inside the classroom, "posturing himself in a -- to me, threatening manner." She stated (contrary to the testimony of both H.H. and Respondent) that L.Y. was in the classroom heading to engage himself in the confrontation. She testified that Respondent then said something to H.H. about "your dirty mother."[8/] She

then removed H.H. from the classroom, and handed him off to a school resource deputy who was a step or two behind her.

26. After having been prompted by counsel,[9/] Ms. Gillis-Parker "remembered" that she had first heard Respondent say "[c]ome on you little pussy-ass bitch, hit me so I can send your ass to jail," the very words alleged in the Administrative Complaint. Despite everyone who was directly involved in the incident agreeing that the incident with L.Y. had concluded and he had left the room before anything regarding H.H. and Respondent transpired, Ms. Gillis-Parker testified that "[y]ou do not talk to a child like I heard Mr. Schrade talking to H.H. and L.Y."

27. Despite testimony that she heard Respondent's outburst well before she came on the scene, Ms. Gillis-Parker later testified that she heard a "dirty ass bitch" comment after she arrived on the scene when H.H. and Respondent were both in the classroom, and when the door was "slinging open." She claimed she heard a different "dirty mother" remark after she was in the room "probably a step in [when] I'm talking to H.H." She testified that she was about three steps into the room when she got to H.H.

Respondent's Version of Events

28. Respondent testified that H.H. had come into the classroom late, after having been sent out of his seventh-period

elective P.E. class. Respondent was teaching sixth-grade world history. Respondent had only just finished with an incident with L.Y., who had also been returned to Respondent's classroom after having been dismissed from his elective class, engaged in disruptive behavior, and had left the classroom.

29. Respondent testified that, upon his entrance into the classroom, H.H. was disruptive, talking, and engaging the other students in conversation. Respondent approached H.H., who was sitting at a desk, and told him that he did not appreciate H.H. disrupting the class. H.H. raised up out of his chair, giving Respondent the impression that H.H. was going to hit him. Respondent said "are you going to hit me?" and indicated that H.H. might have to return to juvenile detention if he did so. Respondent testified, credibly, that he was not trying to embarrass or provoke H.H., but was reminding him of the possible consequences of his actions, stating that "I don't want to get hit by anybody, and I don't want to hit anybody . . . . I was trying to get his attention. I'm trying to keep him from continuing to make the same mistakes and going back to his -- where he's incarcerated, whatever. I wanted him to wake up, I guess, so to speak." Although Respondent indicated that he was probably closer to H.H. than the distance recommended in STARTS

training, he denied being aggressive, indicating rather that he was "[s]imply talking to him . . . [and] verbally confronting him about his behavior."

30. After the exchange, H.H. got up and brushed Respondent's shoulder as he headed for the door to leave. When he left the classroom, Respondent testified that, "out of a moment of stress," he stuck his head out of the door, and said "[d]on't be a wussy." Respondent agreed that "it's probably not the best word to use." Though acknowledging that the term was, in retrospect, not the right choice, Respondent "didn't want [H.H.] to continue going down that road of -- he wasn't going down the right road. That's all there is to it." At the time Respondent made the statement, he believed that H.H. and he "were the only two people outside of anywhere close to proximity . . . . It was he and I by ourselves. There's no other person to hear for him to be embarrassed about other than to not like me saying that."

Ultimate Findings

31. Notwithstanding the harshness of the allegation, evidence of the statement -- as alleged -- was subject to significant contradiction and confusion between witnesses. The testimony was not precise, varied in many important respects, and was not of such weight that it produced a firm belief or conviction of the truth of the allegations.

32. The allegation that Respondent "postured himself in an aggressive or threatening manner toward eighth grade student, H.H., and stated to H.H., 'come on you little pussy ass bitch, hit me, so I can send your ass to jail'" is not supported by clear and convincing evidence.

33. The testimony of Ms. Gillis-Parker as to the timing and sequence of events was simply too riddled with inconsistencies -- both internal and comparative to other testimony -- to be plausible. Her testimony that she could clearly see through the crack at the hinge end of a door that was being slung open, while hurrying to get to the scene, and to be able to accurately assess the situation and determine if someone was "posturing" was not credible. To the extent there was "posturing" involved, it was likely on the part of H.H., who was "fittin' to, like, to try to, like, fight [Respondent]."

34. T.H. described a scene that included none of the actions preceding the utterance of the alleged statement, and the action leading to H.H. leaving the classroom was not anything like that described by either H.H. or Respondent.

35. The descriptions of the events offered by Respondent and H.H. were not dramatically different. They both describe a basic set of circumstances in which Respondent confronted H.H., H.H. left the classroom, Respondent said something to H.H., and H.H. returned to the classroom. The specifics are different.

36. What was proven by evidence that was credible, clear, and convincing was this: H.H. arrived late to Respondent's seventh-period classroom and was, upon his entry, disruptive to Respondent's teaching. Respondent then admonished H.H. which, as was not uncommon, caused H.H. to react. The suggestion that H.H. -- who had just witnessed his "toxic" compatriot, L.Y., leave the classroom -- was seated and working at his computer, and that his simple request to Ms. Lord for assistance triggered Respondent, is not plausible.[10/] Seeing H.H. rise from his desk, Respondent asked if H.H. was going to hit him and, for reasons that were not intended to be aggressive or provoking, suggested that such an act could result in a stint in detention. As H.H. was leaving the room, they brushed against each other. Nothing further can be drawn from that incidental contact, and such does not constitute "physical contact" between the two.[11/] Finally, in an admittedly poor choice, but one taken without forethought or malicious intent, Respondent stuck his head out of the door to tell H.H. to stop being a "wussy." That statement caused H.H. to return to the classroom door, ready to fight. Ms. Gillis-Parker, who had just come onto the scene, then grabbed H.H. and told him to leave.

37. After the incident, DMS conducted an investigation. Mr. Goddard could not recall who was interviewed, other than Respondent, Ms. Gillis-Parker, H.H., and L.Y.[12/] There was no

evidence to suggest that Ms. Lord was interviewed, and Mr. Robinson was not interviewed. On December 1, 2015, a meeting was held with DMS administration, Respondent, and his union representative. Since Respondent was on probationary status, having been hired barely two months earlier, he was given the option to sign a letter of resignation or to be let go. Respondent consulted with his union representative, and elected to resign from his position. The school district did not make any findings regarding the incident.

38. Following the November 30 incident, H.H.'s grades were not impacted and he moved on to the next grade level at the end of the school year. There was no evidence that H.H.'s mental health was affected by the incident. However, rule 6A-10.081(3)(a) "does not require evidence that Respondent actually harmed [H.H.]'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. v. William Randall Aydelott, Case No. 12-0621PL, RO at 76 (Fla. DOAH Aug. 29, 2012; EPC Dec. 19, 2012).

39. It is impossible -- and illogical -- to overlook the situation into which Respondent was thrust after 27 years of incident-free teaching. Unlike Mr. Robinson, who had not only been at DMS for almost two decades, but who had taught H.H. and L.Y. since they had been in sixth grade, Respondent was thrown

into a class midway into a term, a class until which had been increasingly out of control due to the stream of substitutes and paraprofessionals who unsuccessfully tried to impose order. On top of that, and despite a school-wide recognition that H.H. and L.Y. should not be placed in a classroom together, DMS decided to do just that after both were removed from their seventh-period elective classes. That said, the undersigned agrees with Mr. Robinson that Respondent calling H.H. a "wussy" was not the right thing to do, and would not foster a positive learning environment for H.H.

40. What also cannot be overlooked is the relatively mild nature of the action that was proven in this case, i.e., that in a moment in which Respondent "lost his cool," he called H.H. a "wussy." The evidence was not clear and convincing that Respondent was "posturing," or that he made any physical contact with H.H. The evidence indicates that there was no intent or expectation on the part of Respondent that the statement was, or could have been overheard.

## CONCLUSIONS OF LAW

### A. Jurisdiction

41. 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

42. 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:
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> * * *
>
> (j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

43. Rule 6A-10.081, as it existed in 2015,[13/] provided, in pertinent part, that:

> (3) Obligation to the student requires that the individual:
>
> (a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.
>
> * * *
>
> (e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

C. Burden and Standard of Proof

44. 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 Treas., 707 So. 2d 941 (Fla. 3d DCA 1998).

45. 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.
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> > 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. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

46. Section 1012.795 is penal in nature and, as such, "must always be construed strictly in favor of the one against whom the penalty would be imposed and are never to be extended by construction." Griffis v. Fish & Wildlife Conserv. Comm'n,

57 So. 3d 929, 931 (Fla. 1st DCA 2011). 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). Any ambiguities must be construed in favor of the licensee. Lester v. Dep't of Prof'l Reg., 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

47. 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. The Administrative Complaint

Count 1 - Section 1012.795(1)(j)

48. 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.

Count 2 - Rule 6A-10.081(3)(a)[14/]

49. 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.

50. The evidence in this case demonstrated that Respondent called H.H. a "wussy." The evidence did not prove that Respondent "postured" or made any of the more inflammatory acts or statements. The statement was made in the moment, and Respondent believed there was no one within earshot to hear it.

According to Mr. Goddard, H.H. was no stranger to profanity, and the term "wussy" would not in itself have been harmful to his mental health. There was no competent, substantial, or persuasive evidence to demonstrate that the statement was the result of malice, and no evidence that it was made with the intent to embarrass, ridicule, or humiliate H.H. Nonetheless, the statement was careless, and unnecessarily caused H.H. to react negatively. Under the circumstances described herein, Petitioner proved that Respondent failed to make reasonable effort to protect H.H. from a condition reasonably contemplated to be harmful to his mental health in violation of rule 6A-10.081(3)(a).

Count 3 - Rule 6A-10.081(3)(e)[15/]

51. Count 3 of the Administrative Complaint charged Respondent with violating rule 6A-10.081(3)(e) by intentionally exposing H.H. to unnecessary embarrassment or disparagement.

52. A violation of the substantively identical predecessor to the rule cannot occur "in the absence of evidence that the teacher made a conscious decision not to comply with the rule." Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

53. As set forth herein, there was no competent, substantial, or persuasive evidence to demonstrate that the "wussy" statement was made with intent to embarrass or disparage H.H., nor was there evidence that the statement was made as a

conscious decision not to comply with the rule. As such, Petitioner failed to prove that Respondent violated rule 6A-10.081(3)(e).

E. Penalty

54. 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.

55. 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."[16/]

56. 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).

57. Rule 6B-11.007(3) establishes aggravating and mitigating factors to be applied to penalties calculated under the guidelines.[17/]

58. The facts of this case demonstrate that there are no aggravating factors.

59. The following mitigating factors exist:

> Rule 6B-11.007(3)(a) - The severity of the offense, being an uncalculated, unintentional, but careless error, was very mild;
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> Rule 6B-11.007(3)(b) - There was no danger to the public;
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> Rule 6B-11.007(3)(c) - The incident was singular, there were no repetitions;
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> Rule 6B-11.007(3)(e) - Respondent has never before been subject to discipline by the Commission (or by any other state in which Respondent taught);
>
> Rule 6B-11.007(3)(f) - Respondent was in his 28th year of teaching;
>
> Rule 6B-11.007(3)(g) and (r) - Given the lack of any effect on H.H.'s academic advancement, there was no actual damage caused by the violation, and no actual mental harm;
>
> Rule 6B-11.007(3)(i) - An excessive penalty under the facts of this case would unnecessarily inhibit Respondent's re-employment as a teacher;

Rule 6B-11.007(3)(n) - There have been no related violations against Respondent in another state; and

Rule 6B-11.007(3)(t) - The facts set forth in paragraphs 12, 17, 18, 39, and 40 should be considered in substantial mitigation of any penalty in this case.

## 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 letter of reprimand.

DONE AND ENTERED this 23rd day of June, 2017, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of June, 2017.

## ENDNOTES

[1/] The date of Respondent's receipt of the Administrative Complaint was not shown. However, the issue of the timeliness

of the Election of Rights was not contested. Thus, the Election of Rights is accepted as having been timely filed.

[2/] The evidence suggested that the Odyssey training, which was the academically-oriented component of START, was insufficient to non-existent. However, as there was no allegation that the inadequate Odyssey training carried over into other elements of START training, the adequacy of the Odyssey training is not relevant.

[3/] There was testimony devoted to what may have transpired between L.Y. and Respondent. However, the Administrative Complaint included no allegations as to anything having to do with L.Y., and L.Y. did not testify. Having not been alleged, those events cannot form the basis for discipline. Nonetheless, the evidence, such as it was, was not clear and convincing that any act violative of the Principles of Professional Conduct for the Education Profession occurred between L.Y. and Respondent.

[4/] H.H. testified variously that L.Y. was "escorted . . . out of the room," that "he just walked out," or that he did not know because he "wasn't really fully paying attention."

[5/] Ms. Lord would appear to have been a critical witness to the events -- perhaps the person in the best position to observe what happened. However, she was not a witness. There was no evidence that she was even interviewed, despite Respondent having identified her as a witness to the incident. Her testimony may well have served to dispel the many inconsistencies in the description of events.

[6/] H.H. could not "remember fully" what Respondent said about his mother.

[7/] It was not clear whether T.H. thought H.H. was upset at the time, since H.H. asked to leave the room in a normal voice. However, T.H. did testify that:

> A . . . when [H.H.] gets upset, he has to talk to an administrator right away.
>
> Q Does he get upset a lot?
>
> A Kind of. It depends on the situation.

Q What makes him upset?

A Like -- like when people say no to him it makes him upset. When -- he just gets upset for the most simplest things.

[8/] Why the alleged comment about H.H.'s "dirty mother," if said, would not have made it into the Administrative Complaint is a mystery. However, since it did not, it cannot form the basis for discipline. Nonetheless, the evidence is not clear and convincing that it was actually uttered.

[9/] Ms. Gillis-Parker's recollection was "refreshed" by the following:

Q Okay. Now, you -- you've seen the administrative complaint in this case, haven't you?

A I've seen my statement and -- yeah. Can I see that, so I can see if I've seen it? Probably have, yeah.

Q Well, let me just tell you what it says.

A I don't think I've seen that.

Q It alleges in here that on or about November 30th, 2015, during class, respondent Mr. Schrade postured himself in an aggressive or threatening manner toward eighth grade student, H.H. (a minor). And stated to H.H. (a minor) -- and I'm going to use this exact quote, because we're alleging that this came from you, "Come on you little pussy-ass bitch, hit me so I can send your ass to jail." Or words to that effect. Is that what you heard?

A Yes, sir.

(emphasis added).

In explaining why she had not said that earlier, despite the instruction to describe the event "in painstaking detail," Ms. Gillis-Parker stated that she "[s]kipped over [it] because I got emotional on it." Given that Ms. Gillis-Parker's

description of the alleged statement differs from that of H.H., T.H., and Respondent, and was only recalled after pure recitation, her testimony is not accepted.

[10/] The finding on this issue is bolstered by inconsistent testimony from H.H. that, at first, Respondent confronted him because he was asking Ms. Lord for help, but later that Ms. Lord was not in the room during the incident because she may have left to get coffee. In that regard, he was unable to recall "whether she was in the room or not when all this happened." The inconsistency in such an essential fact affects whether H.H.'s testimony can be deemed to be "clear and convincing."

[11/] Furthermore, "physical contact" was not alleged in the Administrative Complaint and cannot form a basis for discipline.

[12/] Mr. Goddard indicated that L.Y. was interviewed as part of the investigation, and that he told Mr. Goddard "the same thing that Mrs. Parker told [him] that happened in the classroom." The evidence established that L.Y. was not in the classroom when the incident with H.H. occurred.

[13/] The rules cited in the Administrative Complaint, rules 6A-10.081(2)(a)1. and 6A-10.081(2)(a)5., did not come into effect until March 23, 2016. However, the language is identical to the rule in effect in 2015, and Respondent was on notice as to the substance of the violations with which he was charged.

[14/] See endnote 13.

[15/] See endnote 13.

[16/] 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 those listed infractions is far more serious than the

minor incident in this case, one taken without evidence of 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 range, 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.

[17/] Rule 6A-10.081 was transferred from Florida Administrative Code Rule 6B-1.006 on January 11, 2013. However, 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 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. for a violation of rule 6B-1.006(3)(a) shall be applied to the corresponding 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.