

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF
EDUCATION,

Petitioner,

vs.

Case No. 17-4212PL

AMANDA AUSTIN,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to section 120.57(1), Florida Statutes (2017), a duly-noticed final hearing was conducted in this case on November 2, 2017, in Panama City, Florida, before Administrative Law Judge Suzanne Van Wyk.

APPEARANCES

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

For Respondent: Anthony D. Demma, Esquire
Meyer, Brooks, Demma and Blohm, P.A.
131 North Gadsden Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

Whether Respondent violated section 1012.795(1)(j), Florida Statutes (2016), or Florida Administrative Code Rule 6A-10.081(2)(a)1.; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On March 13, 2017, Petitioner filed an Administrative Complaint against Respondent, alleging violations of section 1012.795(1)(j) and rule 6A-10.081(2)(a)1. On April 10, 2017, Respondent filed an Election of Rights form disputing the allegations in the Administrative Complaint and requesting a hearing. The case was referred to the Division of Administrative Hearings (Division) on July 25, 2017, and assigned to the undersigned.

The case was initially set for final hearing on September 26, 2017, but was rescheduled to November 2, 2017, due to the impacts of Hurricane Irma.

The final hearing commenced as rescheduled, and Petitioner presented the testimony of the following witnesses: Sharon Michalik, Bay County School District Director of Human Resources; Patrick Martin, Bay County School District Director of Exceptional Student Education; Chris Beard; Sara Devito; Danielle Buchanan; and Russell Buchanan. Petitioner introduced Exhibits P1 through P4, P7, and P8, which were admitted into evidence. Petitioner proffered P6, the deposition testimony of a child, P.G.

Respondent introduced the testimony of Claudia Comerford, Assistant Administrator for Waller Elementary School in Panama City, Florida; and Tracy Whitehead, paraprofessional at Waller

Elementary. Respondent introduced Exhibits R1 through R8, which were admitted in evidence, and offered a pair of child's tennis shoes as a demonstrative exhibit.

The parties stipulated to introduction of the transcript of the deposition testimony of Miriam Gladstone, a licensed mental health counselor, as a late-filed exhibit.

A one-volume Transcript was filed with the Division on November 15, 2017. Petitioner filed the transcript of Ms. Gladstone's deposition on January 2, 2018. At the request of the parties, the deadline for filing proposed recommended orders was set for January 8, 2018.

The parties' timely filed Proposed Recommended Orders have been taken into consideration in preparing this Recommended Order.

Unless otherwise noted, all references to the Florida Statutes herein are to the 2015 version.

Evidentiary Ruling on Proffered Exhibit

Petitioner proffered the deposition testimony of a child, P.G., given on June 1, 2016, in connection with a criminal case against Respondent. Section 90.803(22), Florida Statutes, provides an exception to the hearsay rule for former testimony "given by the declarant . . . in a deposition taken in compliance with law in the course of . . . another proceeding[.]" The exception is limited to cases in which "the

party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination[.]” § 90.803(22), Fla. Stat.

P.G.’s deposition was taken in the course of a criminal action against Respondent for child abuse. Thus, Respondent was a party to the former proceeding.

One of the issues about which the child was examined was whether he was ever in the closet at school; and, if so, who put him there. Whether Respondent held the classroom closet door closed while P.G. was inside is a material allegation in the instant proceeding. Thus, Respondent had a similar motive to develop the testimony now proffered against her.

Finally, the transcript shows that P.G. was questioned by a counselor, Ms. Lucas, on behalf of both the attorney for the State of Florida, and Mr. Allen, Respondent’s defense counsel. Thus, Respondent had an opportunity to cross-examine the declarant.

There is no evidence to support a finding that the deposition was not taken in accordance with the law.

P.G.’s deposition testimony is admissible under section 90.803(22) as an exception to the hearsay rule. This exception applies only if the court finds that the testimony is not inadmissible on the grounds of relevance or prejudice. The

undersigned has reviewed the deposition transcript and finds the statements to be relevant and not inherently prejudicial.

Petitioner's Exhibit P6 is admitted in evidence.

Respondent is correct, however, that the transcript is unreliable. At the time of the deposition, P.G. was a four-year-old child with a language impairment. P.G. responded "okay" to all the relevant questions, and had to be prompted with "Is that a yes or a no?" When prompted, P.G. always responded "yes," the first choice given.^{1/} The only question to which P.G. responded "no" on his own was when he was asked whether a picture of the cartoon character Mickey Mouse was Donald Duck. Furthermore, when Respondent's counsel instructed Ms. Lucas to ask P.G. "Who put him [in the closet]?", Ms. Lucas asked, "Did Ms. Mandy put you in the closet?" While not technically a leading question, the question did not offer the child a broader universe of persons from which to choose. As such, the undersigned finds the testimony inherently unreliable and not probative of any material disputed fact.

FINDINGS OF FACT

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

2. Respondent, Amanda Austin, holds State of Florida Educator's Certificate number 1263731, authorizing her to teach Pre-Kindergarten/Primary Education.

3. At all times material hereto, Respondent was an Exceptional Student Education (ESE) teacher of a pre-kindergarten class at Waller Elementary School in the Bay County School District (District).

4. P.G. was one of Respondent's ESE students during the 2015-2016 school year. He was four years old.

5. P.G. is language and speech impaired. He speaks only one or two words at a time and cannot relate or explain his experiences. When questioned, P.G. usually replies, "okay."

6. P.G. was credibly described as a "runner," wanting to be active in the classroom, rather than sitting with the other children. P.G. preferred to be playing in the classroom "kitchen," reading on his own, or filling bowls with water, rather than participating in lessons.

7. P.G. often screamed and cried during the school day, especially when required to participate in activities he did not wish to, such as sitting with the other children.

8. Whether P.G. had a habit of entering the supply closet in his classroom was a disputed issue.^{2/} The supply closet opens inward from the classroom.

9. P.G.'s parents, Danielle and Russell Buchanan, frequently volunteered in the classroom during the 2015-2016 school year.

10. The Buchanans testified they never observed P.G. enter the supply closet when they were volunteering in the classroom.

11. Tracy Whitehead was the paraprofessional in Respondent's classroom from October 2015 through January 2016. Ms. Whitehead was impressed with P.G.'s ability to read a word or two to her, even though his speech was impaired. She related P.G.'s fondness for books, and explained that he was apt to scream and cry when she or Respondent had to take his book away to get him to "carpet time" or other group activities.

12. Ms. Whitehead testified that P.G. often entered the supply closet on his own accord, and would retrieve a book and sit in the closet to read the book.

13. Ms. Whitehead's testimony is accepted as more credible and persuasive than the Buchanan's.^{3/} P.G. frequently entered the supply closet during the day to look at books.

The Closet Incident

14. During the 2015-2016 school year, Respondent's classroom was located across the hall from Sara Devito's classroom. Ms. Devito was a speech therapist at Waller Elementary. P.G. and three other students in P.G.'s class

visited Ms. Devito's class for 30-minute therapy sessions on specified days each week.

15. On January 26, 2016, at 9:00 a.m., Ms. Devito stepped into Respondent's classroom to retrieve a student, not P.G., for his or her speech therapy session. Ms. Devito observed P.G. "having a tantrum," meaning he was "screaming and crying," which she described as "pretty typical behavior for him." She also observed that Respondent was holding P.G. underneath his arms. Ms. Devito testified that P.G. had lifted his feet off the floor so Respondent was holding P.G. to keep him from falling. Ms. Devito described Respondent's demeanor as calm and happy.

16. Ms. Devito returned to Respondent's classroom 30 minutes later to drop off the student she had taken for speech therapy. Ms. Devito took only one or two steps into the classroom from the doorway and was only in the classroom for three to five seconds.

17. Ms. Devito heard crying and screaming consistent with P.G.'s behavior. She also heard banging noises. Ms. Devito scanned the room, but did not see P.G.

18. Ms. Devito testified that she observed Respondent standing in front of the supply closet door with her left hand resting on the door handle and her left leg against the closet door.

19. Ms. Devito concluded that P.G. was inside the closet, screaming and crying, and that Respondent was preventing P.G. from leaving the closet.

20. Ms. Devito left Respondent's classroom to attend a meeting concerning another child. After the meeting, she ate lunch with another speech therapist, Ms. Stafford. During lunch Ms. Devito confided in Ms. Stafford about what she observed in Respondent's classroom. Ms. Stafford told Ms. Devito the incident had to be reported to administration immediately.

21. Ms. Devito and Ms. Stafford together reported the incident to Assistant Principal Claudia Comerford, who in turn brought in the Principal Mr. Beard. Ms. Devito gave a written statement of the incident.

The Shoe-Taping Incident

22. On January 26, 2016, P.G. was picked up from school by his great-grandparents, Brenda Barron and Abner Garrett, as was the routine on the days Ms. Buchanan worked.

23. After Ms. Barron and Mr. Garrett drove P.G. to their home, they observed masking tape across the Velcro closures of P.G.'s shoes and wrapped around the shoes completely.

24. The great-grandparents called Ms. Buchanan, who instructed them not to remove the shoes. She stated she would leave work directly and meet them at their home.

25. The drive from Ms. Buchanan's work to her grandparents' home is approximately 30 minutes.

26. When she arrived at her grandparents' home, Ms. Buchanan took photographs of P.G.'s shoes on his feet, but she did not remove the shoes.

27. Instead, Ms. Buchanan called Waller Elementary and reported to Ms. Comerford that Respondent had taped P.G.'s shoes to his feet and that she was bringing P.G. to the school immediately to show Ms. Comerford and have pictures taken.

28. Ms. Buchanan drove P.G. to the school, approximately five minutes away, and met with Ms. Comerford, who took pictures of the shoes and prepared a report for school administrative purposes.

29. After the pictures were taken, Ms. Buchanan finally removed her son's shoes.

30. Ms. Buchanan testified that P.G. had red marks on his feet where the shoes had rubbed, bruises where the shoes were too tight, and skin missing around his toes.

Subsequent Action Against Respondent

31. Respondent was terminated from Waller Elementary, effective February 1, 2016.

32. Respondent was also arrested and charged criminally for one or both of the incidents. The record contains no information on the disposition of the case.

33. According to Ms. Buchanan, she and her husband have also brought a civil action against Respondent in connection with the incidents.

34. Petitioner filed the instant Administrative Complaint against Respondent on February 6, 2017.

Administrative Complaint

35. Petitioner's Administrative Complaint against Respondent contains the following material allegations:

On or about January 26, 2016, Respondent engaged in inappropriate behavior when she held the door of the classroom closet closed while a four-year-old student, P.G., was inside the closet screaming.

On or about January 26, 2016, Respondent engaged in inappropriate conduct when she tightly taped the top of four-year-old student P.G.'s shoes in order to prevent P.G. from removing the shoes. As a result, P.G. had red marks on his feet.

The Closet Incident

36. The only witness to the closet incident is Ms. Devito. Ms. Devito was in the classroom for only three to five seconds. She heard screaming and crying consistent with P.G.'s behavior. She did not see P.G. in the classroom when she quickly scanned it.

37. A counter with built-in cabinets both above and below extends the length of the wall between the classroom door and the closet door. The counter contains a sink for handwashing,

and generally holds teaching materials and classroom supplies. The counter ends just shortly--approximately one foot--before the closet door.

38. Ms. Devito testified at the final hearing that she could see Respondent's feet, which were separated, Respondent's left leg against the closet door, and Respondent's left hand resting on the door handle.

39. Respondent introduced photographs of the classroom taken by the Bay County Sheriff's Office in connection with the criminal investigation of Respondent's alleged conduct. If Ms. Devito was standing just inside the classroom door, and Respondent was close enough to the closet door to rest her left leg against it, Ms. Devito's view would have been partially obstructed by the counter and built-in cabinets.^{4/}

40. Particularly troubling is Ms. Devito's testimony regarding the placement of Respondent's hand. Ms. Devito testified that Respondent's left hand was resting on the door handle. From the vantage point just inside the classroom, Ms. Devito could not have seen Respondent's left hand. Ms. Devito would have had to be several steps into the classroom and several steps to the left of the built-in counter in order to see Respondent's left hand.

41. Ms. Devito gave conflicting testimony on this important allegation in her deposition. Initially, she testified, as follows:

So when I walked in, she did have her feet separated and her hand on the handle like this (indicating). She wasn't leaning with her shoulder, but her hip was - her leg and hip were resting on the door.

Just six lines later, Ms. Devito testified, as follows:

[A]nd her hand was - I didn't really see her hand, if it was grasping the handle or not, but I did see her arm there where she would be on the handle, and that's what I saw.

42. Ms. Devito's testimony that Respondent had her hand on the supply closet handle is neither credible nor reliable.

43. Even if Ms. Devito unequivocally testified that Respondent's hand was resting on the handle, that would be insufficient evidence to support a finding that Respondent "held the door of the classroom closet closed," as alleged in the Administrative Complaint.^{5/}

44. When asked during the deposition if she could see Respondent's feet, Ms. Devito responded, "I just know they were separated because I saw her legs separated."

45. Ms. Devito would have had no view of Respondent's feet from two steps inside the classroom door if Respondent was standing so close to the closet door to have her left leg

leaning against it. Ms. Devito's view of Respondent's feet would have been completely obscured by the built in cabinets.

46. As to the exact location of Respondent in relation to the closet door, Ms. Devito's testimony was not credible and is not accepted as reliable.

47. The most Petitioner proved was that P.G. was crying and screaming when Ms. Devito dropped off his classmate from therapy, and that she did not see him in the classroom.

48. Petitioner's evidence does not even prove P.G. was in the closet. P.G. could have as easily been elsewhere in the classroom and simply not spied by Ms. Devito in her brief scan of the classroom.

49. Petitioner did not prove that Respondent held the closet door closed while P.G. was inside, as alleged in the Administrative Complaint.

Shoe Taping Incident

50. The pictures of P.G.'s shoes taped on his feet do not suggest they were tightly taped. The shoes are not "puckered" on either side of the tape, which would indicate that the tape was wrapped more tightly around the shoes than the shoes would have fit without tape.

51. The undersigned had the opportunity to examine P.G.'s shoes at the final hearing. Again, the shoes did not "pucker" or "bulge" on either side of the tape. The tape was not broken,

stretched, or even partially removed. The tape sat flatly on the top of the Velcro strap preventing it from being pulled up by four-year-old hands.

52. Ms. Buchanan was able to remove P.G.'s shoes without removing the tape, breaking the tape, or even stretching it out. If the tape were tight enough to prevent the shoes from being removed, it would have been ripped, broken, or at least stretched in the process of removing the child's shoes.

53. The shoes were not "tightly taped" to P.G.'s feet, as alleged in the Administrative Complaint.

54. The tape did prevent P.G. from removing his shoes. The tape prevented P.G. from lifting the Velcro strap to loosen and remove his shoes.

55. The taping did not leave red marks on P.G.'s feet, as alleged in the Administrative Complaint.

56. Respondent introduced two photographs of P.G.'s feet taken at Waller Elementary School after Ms. Buchanan removed P.G.'s shoes in Ms. Comerford's presence. One photograph shows P.G.'s right foot and part of the left foot. The second photograph shows a side view of one foot.

57. The photographs show light pinkish marks across the upper part of P.G.'s feet close to the ankles, and slight patterned indentations on the skin. The indentations appear consistent with impressions from the weave of a sock.

58. The photographs were taken at least 50 minutes after P.G. was picked up from Waller Elementary on January 26, 2016.

59. There is no direct evidence establishing the specific time of day Respondent put the tape on P.G.'s shoes. If the shoes had been tightly-taped to P.G.'s feet for 50 minutes or more, one would expect more serious consequences than light pinkish marks and slight sock impressions.

60. Petitioner did not prove that Respondent's taping of P.G.'s shoes resulted in red marks on P.G.'s feet, as alleged in the Administrative Complaint.

61. Petitioner introduced evidence that applying masking tape to prevent a student from loosening the Velcro fasteners of his shoes was not a common practice at Waller Elementary, but no evidence that the practice is, per se, a violation of any professional standard.^{6/}

62. Petitioner did not prove, by clear and convincing evidence, that Respondent engaged in inappropriate conduct in connection with either incident.

CONCLUSIONS OF LAW

63. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2017).

64. This is a proceeding in which Petitioner seeks to discipline Respondent's educator's certification. Because disciplinary proceedings are considered 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).

65. 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 Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

66. The Administrative Complaint alleges the following facts as a basis for imposing discipline:

On or about January 26, 2016, Respondent engaged in inappropriate behavior when she held the door of the classroom closet closed while a four-year-old student, P.G., was inside the closet screaming.

On or about January 26, 2016, Respondent engaged in inappropriate conduct when she tightly taped the top of four-year-old student P.G.'s shoes in order to prevent

P.G. from removing the shoes. As a result, P.G. had red marks on his feet.

67. Based upon these factual allegations, Petitioner has charged Respondent with violating section 1012.795(1)(j) and rule 6A-10.081(2)(a)1. Section 1012.795(1)(j) provides, in pertinent part:

(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.

68. Rule 6A-10.081(2)(a)1. provides in pertinent part:

**6A-10.081 Principles of Professional Conduct
for the Education Professional in Florida.**

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

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

1. 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.

69. Based upon the Findings of Fact herein, Petitioner failed to prove the material allegations of the Administrative Complaint by clear and convincing evidence.

70. The undersigned concludes that Respondent did not violate either section 1012.795(1)(j) or rule 6A-10.081(2)(a)1.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Administrative Complaint be dismissed in its entirety, and the Education Practices Commission take no action against Respondent's certificate.

DONE AND ENTERED this 30th day of January, 2018, in
Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of January, 2018.

ENDNOTES

^{1/} Except for one question to which he responded, "Yes or no. Yes."

^{2/} At all times material hereto, the supply closet did not have an operable lock, but was kept closed and was posted with a red "stop sign," to warn students it was "off limits."

^{3/} The undersigned does not necessarily find the Buchanan's testimony incredible. Ms. Whitehead's testimony was more credible than the Buchanan's both because she had more opportunity to observe P.G.'s behavior in the classroom and because P.G.'s behavior may have been different when his parents were present in the classroom.

^{4/} In the photographs, a small, portable bookshelf is located at the end of the built-in counter and oriented perpendicular thereto. The bookshelf occupies the space between the end of the counter and the closet door, and extends beyond the counter approximately three feet. Petitioner disputed that the bookshelf was placed in that location on the date in question, and introduced testimony to that effect.

The undersigned makes no finding regarding the location or position of the bookshelf in question on the date in question. No such finding is necessary to support the finding that Ms. Devito's view was partially obscured on the date in question by the built-in counter and cabinets.

^{5/} Moreover, Ms. Devito's testimony that Respondent was leaning against the closet door, which opens inward, does not support a finding that Respondent was holding the door closed.

^{6/} Moreover, mere taping of the shoes, without more, was not the substance of the allegation as pled.

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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.