

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF  
EDUCATION,

Petitioner,

vs.

Case No. 17-6391PL

KRIZIA COLUMNA,

Respondent.

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RECOMMENDED ORDER

On February 21 and 22, 2018, Administrative Law Judge (ALJ) J. Lawrence Johnston of the Division of Administrative Hearings (DOAH) conducted a disputed-fact hearing in this case at Shingle Creek Elementary School in Orlando.

APPEARANCES

For Petitioner: Ron Weaver, Esquire  
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Ocala, Florida 34477-0088

For Respondent: Tobe M. Lev, Esquire  
Egan, Lev, Lindstrom & Siwica, P.A.  
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STATEMENT OF THE ISSUES

Whether the Respondent, an elementary school teacher, should be disciplined under sections 1012.795 and 1012.796, Florida Statutes (2016),<sup>1/</sup> for inappropriately disciplining a student in

violation of Florida Administrative Code Rules 6A-10.081(2)(a)1. and 5.<sup>2/</sup>; and, if so, the appropriate discipline.

PRELIMINARY STATEMENT

On October 16, 2017, the Petitioner filed an Administrative Complaint against the Respondent. The three-count Administrative Complaint charged the Respondent with violating section 1012.795(1)(j) by violating rules 6A-10.081(2)(a)1. (failure to protect students from harmful conditions) and 5. (intentional exposure of students to unnecessary embarrassment or disparagement).

The Respondent disputed the charges and requested a hearing under section 120.57(1), Florida Statutes. The Petitioner forwarded the case to DOAH for assignment to an ALJ. It was designated DOAH case 17-6391PL and scheduled for hearing on February 21, 2018, by video teleconferencing.

On February 7, the parties' request for an in-person hearing at the Shingle Creek Elementary School (Shingle Creek) was granted for the convenience of the witnesses. On February 14, the Petitioner was granted leave to file an Amended Administrative Complaint that clarified the factual allegations, as follows:

3. On or about October 13, 2016, Respondent suspected that seven year old, female student, B.K., stole a piece of candy during class. As B.K. stood crying in the presence of other students, Respondent told B.K. "I'm going to go ahead and check your desk."

Respondent then tipped B.K.'s desk over and the contents, including candy, fell to the floor. After Respondent questioned B.K. about the candy, Respondent then turned to her students and said "there is one thing Ms. Columna does not allow in her classroom, she does not allow stealing." Respondent asked the entire class "what don't we do in Ms. Columna's class?" The students responded "we don't steal." Respondent then directed B.K. to "clean up her desk. Clean up the papers on the floor."

4. Respondent also instructed her students to take turns hitting or slapping B.K.'s hands. Several students hit B.K.'s hands, causing B.K. to cry.

At the hearing, the Petitioner called 14 witnesses--two investigators, nine students, the parents of one of the students, and Shingle Creek's school principal. The Petitioner's Exhibits 1 through 47 and 49 were received in evidence, subject to the Respondent's objections to the use of hearsay in the exhibits as the sole support for findings unless the hearsay would be admissible over objection in civil actions. § 120.57(1)(c), Fla. Stat. The Respondent testified and called two teachers and an expert witness on child witness interviews. The Respondent's Exhibits 1, 2, 3, 5, and 6 were received in evidence.

A Transcript of the hearing was filed, and the parties filed proposed recommended orders that have been considered.

#### FINDINGS OF FACT

1. The Respondent holds Florida Educator Certificate 1197418, covering Elementary Education, English for Speakers of

Other Languages (ESOL), Reading, and Exceptional Student Education. The certificate is valid through June 30, 2022.

2. The Respondent began the 2016/2017 school year teaching second grade at Shingle Creek in Orlando, which is in the Orange County Public Schools (OCPS) school district. It was her fourth year of teaching there. Her teacher evaluations were satisfactory. She did not use corporal punishment, and did not yell or scream at her students. She had no disciplinary history. (She had one non-disciplinary directive for blurting out an expletive in pain when she fell in class and hurt her knee.)

3. Shortly after the start of the 2016/2017 school year, the Respondent realized she had a student, B.K., who took things that did not belong to her. B.K. was bright and popular among the children in class, but she could not be relied on to tell the truth. From the beginning of the school year, the Respondent had to take steps to discipline B.K.'s misbehavior and try to correct it.

4. Soon after the start of the school year, B.K. put a laptop computer in her back pack, instead of returning it to the charging cart in the classroom as all the other children did when they finished using it. At the end of the day, B.K. told the Respondent that another student put the laptop in her back pack. The other student denied it, and the Respondent was obliged to refer the matter to the school administration. An assistant

principal investigated and interviewed B.K., who admitted to taking it.

5. The Respondent also found her own personal books in B.K.'s back pack. B.K. falsely accused a classmate of putting them there.

6. On another occasion, another teacher caught B.K. with the Respondent's "Hello Kitty" flash drive. B.K. told the teacher that a friend had given it to her, which was false, and the teacher wrote a referral to administration.

7. As a result of these incidents, the Respondent had a conference with B.K.'s parents. B.K.'s father reported that he had found books at home that did not belong to his daughter. B.K. admitted that she had taken them from the classroom. The Respondent was obliged to make a classroom referral.

8. The Respondent continued to learn of other similar incidents. Once B.K. took two bags of candy the Respondent used to reward good behavior and achievement by her students. Another teacher saw B.K. distributing the candy to classroom friends outside the classroom and reported it to the Respondent, who realized it was her candy that had gone missing.

9. After the candy incident, the Respondent again met with B.K.'s parents and decided to impose consequences in addition to the classroom referral to discipline B.K. for the theft of the candy—namely, she decided to withhold the prize she planned to

give students on Thursday, October 13, for good behavior during the preceding month. (Friday, October 14, was a day off school.) She told B.K.'s parents about the consequences she planned to impose.

10. As October 13 approached, B.K. continued to misbehave by taking things that did not belong to her, including a Post-It note dispenser and a bag of erasers. The Respondent reported to the school guidance counselor and assistant principal that B.K.'s misbehavior seemed to be escalating.

11. During the last class period of the day on October 13, while the class was working on a science project, the Respondent called each student up to her desk individually to reward good behavior with points, prizes, candy, and to identify misbehavior to be corrected. Under the "class dojo" behavior system the Respondent was using, class participation was rewarded with points and corresponding "karate" belts. Good behavior was rewarded with candy. When it was B.K.'s turn, the Respondent explained that she was getting points and a belt for class participation but was not getting candy because of her taking things that did not belong to her, and not telling the truth. The Respondent told B.K. that she would have a "clean slate" going forward and would get points and both prizes and candy if she earned them with good behavior in the next month.

12. Not long after the Respondent's talk with B.K., another student said out loud that B.K. had candy that did not belong to her. The Respondent asked B.K. if she had candy, and B.K. denied it. The Respondent then asked her students to check to see if they had the candy they had just been given. One student, who sat next to B.K. and had put her candy in her desk, said hers was missing. The Respondent then asked B.K., who still denied taking the candy, to show her what was in her desk. B.K. just froze and did not comply. The Respondent repeated herself. B.K. again refused and began to get emotional. Because the desk was a "jumbled mess" of tissues, papers, food, a milk carton, pencils and other things, and because bending down low was difficult for the Respondent, the Respondent tipped the desk over enough for some of items in it to begin falling out on the floor. The missing candy was among the first several items that fell out on the floor. At this point, B.K. claimed that the student whose candy was missing had given it to her, which the other student denied. The Respondent then told B.K. that the Respondent was going to have to write B.K.'s parents a note about the incident. She also told B.K. to pick her things up off the floor and put them back in her desk.

13. During these proceedings, B.K. became emotional and started crying. At one point, she kicked at her desk or chair. The Respondent had her sit up near the chalkboard until she

calmed down. The Respondent sat down at her desk facing B.K. and told her she was very disappointed with her because of the talk they just had.

14. Although most of the students had resumed working on their science projects, one child asked out loud if B.K. had stolen the candy. The Respondent did not directly answer the question. Instead, she said something like, "I'm not sure what you just saw and heard, but one thing we don't do in this class is, we don't steal, right? What don't we do?" Some of the students who were listening repeated, "we don't steal."

15. When things settled back down, the Respondent wrote a note to B.K.'s parents notifying them about the candy incident and telling them that B.K.'s behavior that day had been "in the red" (i.e., bad). B.K. went back to sitting at her desk, and the rest of the class period was uneventful. In fact, the school principal came to the Respondent's classroom before the class period ended to deliver notices for the students to take home to their parents. Although she was not in the classroom long, she noticed nothing unusual.

16. At home after school on October 13, B.K.'s mother asked her about the Respondent's note. B.K. denied stealing candy. She told her parents that the Respondent gave all the other children in the class candy except her and accused her of taking a piece of candy, which she denied. B.K. then told them that the



Respondent then kicked her chair, dumped her desk on the floor, made her clean it up and put her desk back in order, and made the other students line up and take turns hitting her hand hard in punishment. Her parents decided to talk to the Shingle Creek principal about it on the next school day, which was Monday.

17. When B.K. and her parents arrived at school on Monday morning, they encountered and talked to several of B.K.'s classmates outside the school. At least two of the classmates were approached by B.K., who brought them to her parents. The evidence was unclear as to how many other classmates were involved, or how the conversations went. The language skills of the students in general were those of second-graders, and several of the children were speakers of English as a second language. B.K.'s parents speak English with a strong Haitian accent. For example, the words "hit" and "hate" sound very similar, and it is not easy to understand their spoken English. It is unclear exactly what was said, but B.K.'s parents came away from the conversations convinced that B.K. was telling the truth about what happened in class on October 13. It is also possible that the children's memories and recollections were influenced by these conversations.

18. B.K.'s parents then went to speak to the school's principal. B.K. did not go to class but stayed with her parents in the principal's office. After talking to the family, the

principal telephoned OCPS's senior manager of employee relations, who advised her to gather witness statements.

19. The principal and several assistants began taking statements, starting with B.K. and her parents. After them, the Respondent was called to the principal's office. Following the instructions given to all teachers by the teacher union, the Respondent declined to give a written statement without a lawyer or union representative present. She did have a conversation with her principal. The principal asked her to explain the situation with B.K. on Thursday. The Respondent told her about the candy incident, including tipping the desk to find the candy; about being very disappointed with B.K.; and about writing a note to B.K.'s parents. The Respondent recalls the principal asking if anything else happened, and she answered, no. The principal recalled the conversation a bit differently. She thought the Respondent admitted to dumping B.K.'s desk over, raising her voice, and being angry with B.K. She also remembered asking the Respondent if any of the other students hit B.K. and the Respondent answering that she did not see anyone hit her.

20. The principal then began interviewing the Respondent's students one by one. The interviews continued the rest of the morning and into lunch recess. Some statements were taken the next day. It is unclear to what extent the student witnesses discussed their statements among themselves during the day.

21. The interviews were not video or audio-recorded. The interviewers thought they were asking proper, open-ended questions that did not suggest answers, but studies have shown that interviews usually are not as proper or open-ended as interviewers think they are, especially when the interviewers do not have extensive training. The training of the principal and her assistants in interview techniques was limited. Proper interview techniques help ensure that witness memories and statements are authentic, accurate, and reliable. They are especially important for child witnesses.

22. The statements were not verbatim, or close to verbatim. Two of the statements were written with difficulty by the second-graders themselves and were not very articulate. The rest were written by the adult interviewers and signed by the second-graders so the process would go faster. These statements were written in a summary or conclusory fashion, without much detail, and were similar to one another, suggesting that they were recording the answers to questions of particular interest to the adult interviewers. The statement forms themselves had spaces designated for the "Date of Infraction" and "Location of Infraction," and had signature blocks that said: "I swear/affirm the above and/or attached statements are true and correct. I understand that providing false information is punishable under

the Student Code of Conduct." It is doubtful that the second-graders would have understood what that meant.

23. Fourteen (all but one) of the statements said that the Respondent told the students to hit or slap B.K.'s hand or hands. Some added that B.K. was crying; some added that the Respondent told them to hit hard, or harder. One statement said they did it because B.K. took candy, one said it was because B.K. was a thief, and one said it was because B.K. steals too much. Some of the statements were surprising because of the capabilities of the child supposedly giving it: one of the students was non-verbal and would not have been comfortable speaking to a stranger; another was autistic and unable to sequence information such as the days of the week; and another had behavioral and emotional issues that made him incapable of giving a statement. Some of the second-graders added remarkable features in their statements that were not mentioned by anyone else, or by just a few: one said the Respondent threw B.K. down to the ground; three, including one attributed to the child with behavioral and emotional issues, said that the Respondent threatened to call the police; one said that the Respondent told B.K. to put her desk by the wall; and one said the Respondent told the class to avoid B.K.

24. During the morning on October 17, several of the Respondent's students told her that B.K.'s parents had talked to

them before school about the Respondent making them hit or slap their child on the hand, and told her that B.K. no longer was in the Respondent's class.

25. After the second-graders' statements were gathered, the school principal presented them to the OCPS senior manager of employee relations, who scheduled a pre-determination meeting on October 21. His investigative report stated: 16 student statements were obtained; 15 confirmed being directed by the teacher to hit B.K. on the hand; 3 confirmed the teacher telling the students to repeat "don't steal"; 8 confirmed the teacher yelling; 5 confirmed the teacher telling them to hit B.K. hard; 3 confirmed the teacher calling B.K. a thief; and 3 confirmed the teacher saying she was going to call the police. The investigative report also stated that the Respondent: admitted getting angry and raising her voice; admitted pouring out the contents of the student's desk; admitted saying and having the students repeat, "what is it we don't do in class? We don't steal"; stated she did not recall directing the students to hit B.K.; did not know if B.K. was hit "on October 17," but did know that B.K. lies; and did not report the incident to the school administration on October 17.

26. Based on the investigative report, OCPS terminated the Respondent's employment. The Respondent filed a grievance which was arbitrated under the terms of the teacher union contract.

27. When the matter was referred to the Petitioner, another investigation was conducted. On February 17, 2017, the second-graders were interviewed again by the Petitioner's investigator. The investigator asked the questions and wrote the answers. The second-graders were asked to confirm that the answers were written down correctly and signed their statements. Like the principal and her assistants, the Petitioner's investigator believed she asked non-suggestive, open-ended questions. Like the principal and her assistants, the Petitioner's investigator did not have extensive training in the proper techniques for manner of interviewing children. Like the interviews conducted by the principal and her assistants, the Petitioner's investigator did not video or audio-record her interviews.

28. Each student interviewed by the Petitioner's investigator stated that the Respondent told the students to "slap" B.K.'s on the hand as hard as they could and that slapping B.K. made the student feel "sad." One said that B.K. cried. One said the Respondent made the class stand in a circle and take turns slapping B.K. on the hand.

29. Unlike the school principal and her assistants, the Petitioner's investigator had the students describe how hard they were supposed to hit B.K. on a scale of 1 to 5. This question elicited several responses that they were told to hit "hard," one

that they were told to hit "as hard as we could," and one that gave a rating of 5.

30. In the statements gathered by the Petitioner's investigator, several of the students mentioned that the Respondent told them to pretend B.K. was a ghost, and several said the Respondent told them not to tell anyone about what happened. Oddly, neither of these remarkable details was mentioned in any of the statements taken by the principal and her assistants.

31. The Respondent's grievance was arbitrated in May 2017. After a three-day hearing, the termination was upheld, despite testimony from another teacher that she overheard B.K. admit to stealing candy and to lying to get the Respondent in trouble because she was tired of getting caught stealing by the Respondent.

32. Several of the students who gave statements testified at both the arbitration hearing and the hearing in this case. Several were deposed before testifying. The Petitioner in her Proposed Recommended Order suggested that credibility issues arising from the prior events should be ignored because they were cured by the live testimony. That is not true. Issues remain as to whether the students' live testimony was influenced by what preceded. In addition, their testimony at the hearing was confusing and inconsistent in many respects.

33. Two of the students testified that the students formed a circle around B.K., while three said they formed a line. One said the line was in the shape of a C or J. One specified that they hit B.K.'s hand while she was either in a corner or by a desk where the sink was located. One said B.K. was standing in front of another student's desk. Two said B.K. was standing in the middle of the classroom. One said B.K.'s hand was held out palm down. Another said it was palm up. One said the Respondent held B.K.'s hand out.

34. The evidence, taken as a whole, is not clear and convincing that the Respondent had her students hit or slap B.K. as punishment for taking the candy. While several children made statements that included some version of this alleged incident, they all started with B.K., who was overheard saying she was lying, and the other children's statements are fraught with questions that make them unreliable and insufficient to prove those facts clearly and convincingly.

35. Meanwhile, the Respondent's version of what happened, while self-serving, is more persuasive. Her refusal to give a written statement, and her manner of answering questions, may have raised suspicions on the part of the school principal, and may have contributed to a number of misunderstandings by the principal and B.K.'s parents, but they do not prove that the Respondent was lying. The Respondent's conduct that was proven



by the evidence did not rise to the level of a disciplinable failure to make reasonable effort to protect B.K. from conditions harmful to learning and/or to her mental and/or physical health and/or safety, and did not intentionally expose B.K. to unnecessary embarrassment or disparagement. What the Respondent actually did was within the realm of making reasonable efforts to correct B.K.'s problem behaviors and to teach her and her classmates how to behave properly and acceptably, while at the same time trying to keep order in the classroom and continue delivering academic instruction.

#### CONCLUSIONS OF LAW

36. Because the Petitioner seeks to impose license discipline, she has the burden to prove the allegations by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). This "entails 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994). See also Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "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, 988 (Fla. 1st DCA 1991).

37. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see also Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) ("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee." (citing State v. Pattishall, 126 So. 147 (Fla. 1930))).

38. The grounds proven in support of the Petitioner's assertion that the Respondent's license should be disciplined must be those specifically alleged in the Amended Administrative Complaint. See e.g., Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Cottrill v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Dep't of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Hunter v. Dep't of Prof'l Reg., 458 So. 2d 842 (Fla. 2d DCA 1984). Due process prohibits the Petitioner from taking disciplinary action against a licensee based on matters not specifically alleged in the charging

instruments, unless those matters have been tried by consent. See Shore Vill. Prop. Owners' Ass'n, v. Dep't of Env'tl. Prot., 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

39. The Petitioner charges the Respondent with being in violation of section 1012.795(1)(j) by violating rules 6A-10.081(2)(a)1. and 5., which are Principles of Professional Conduct for the Education Profession.

40. Under rule 6A-10.081(2)(a)1., a teacher is required 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."

41. Under rule 6A-10.081(2)(a)5., a teacher is prohibited from intentionally exposing a student to unnecessary embarrassment or disparagement.

42. Under section 1012.795(1), the possible discipline for violations includes suspension for up to five years, revocation for up to ten years, and permanent revocation. In her proposed recommended order, the Petitioner states that she is seeking revocation because the alleged violations were so serious. However, the most serious allegations were not proven by clear and convincing evidence; and the facts proven did not constitute violations.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a final order finding the Respondent not guilty and dismissing the Amended Administrative Complaint.

DONE AND ENTERED this 1st day of May, 2018, in Tallahassee, Leon County, Florida.



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J. LAWRENCE JOHNSTON  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of May, 2018.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, the Florida Statutes cited refer to the 2016 codification, which contains the statutes that were in effect in October 2016, when the alleged violations occurred.

<sup>2/</sup> All rule citations are to the Florida Administrative Code rules that were in effect in October 2016, when the alleged violations occurred.

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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.