STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DESOTO COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 19-1793TTS

CASEY LOOBY,

Respondent.
_____/

RECOMMENDED ORDER

On June 19, 2019, Hetal Desai, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a hearing in this case in Arcadia, Florida.

APPEARANCES

For Petitioner: Mark E. Levitt, Esquire
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For Respondent: Mark Herdman, Esquire
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STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner, DeSoto County School Board (School Board), to suspend Respondent without pay, and terminate her employment as an Exceptional Student Education (ESE) teacher.

PRELIMINARY STATEMENT

By letter dated March 6, 2019, the School Board's superintendent, Adrian Cline (Superintendent Cline), informed Respondent he was suspending her without pay effective March 8, 2019, and recommending the School Board terminate her from employment at its next meeting. The letter referenced "an incident on February 11, 2019, involving you throwing two handheld foam footballs at a student in your classroom with cerebral palsy confined to a wheelchair or walker." Respondent timely requested an administrative hearing, and the matter was referred by the School Board to DOAH on April 4, 2019.

After one continuance, the final hearing was held on June 19, 2019. At the hearing, the School Board called four witnesses: Whitney Walker and Matthew Blevins, paraprofessionals who worked in Respondent's classroom; Cynthia Langston, an assistant principal at the High School (Assistant Principal Langston); and Superintendent Cline. School Board Exhibits P1 through P7 were admitted into evidence. Respondent presented her own testimony and that of Jody Murray, another paraprofessional who worked in Respondent's classroom. Respondent's Exhibits R1 through R4 were accepted in evidence. Of special note are Exhibits P1 and R4, which are small foam footballs.

A Transcript of the hearing was filed July 3, 2019. The parties timely submitted proposed recommended orders (PROs), which have been considered.

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). Therefore, references to Florida Statutes and Florida Administrative Code rules are to the 2018 versions. References to the School Board policies are to those in effect for the 2018-2019 school year.

FINDINGS OF FACT

Parties and Relevant Policies

1. The School Board is charged with the duty to operate, control, and supervise public schools in DeSoto County. Art. IX, § 4(b), Fla. Const. (2018). This includes the power to discipline instructional staff, such as classroom teachers. §§ 1012.22(1)(f) and 1012.33, Fla. Stat.

2. Respondent is an ESE classroom teacher at DeSoto County High School (High School). Although Respondent has been teaching for 23 years, she has only been an ESE classroom teacher for the School Board since 2016.

3. Superintendent Cline is an elected official who has authority for making School Board personnel decisions. His

duties include recommending to the School Board that a teacher be terminated. § 1012.27(5), Fla. Stat.

4. David Bremer (Principal Bremer) was the principal at the High School at all times relevant to these proceedings, and Cynthia Langston served as the Assistant Principal.

5. The parties' employment relationship is governed by School Board policies, Florida laws, Department of Education regulations, and the Collective Bargaining Agreement (CBA) entered into by the School Board and the Desoto County Educators Association, a public union. The CBA relevant to this action was effective July 1, 2018, through June 30, 2021.

6. The School Board employed Respondent on an annual contract basis. "Annual contract" means an employment contract for a period of no longer than one school year which the School Board may choose to award or not award without cause. § 1012.335(1)(a), Fla. Stat.

7. The testimony at the hearing and language in the CBA establish that the annual contract of a teacher, who has received an indication he or she "Needs Improvement" or is placed on an improvement plan, is not eligible for automatic renewal. In these situations, the superintendent has discretion regarding whether to renew that teacher's annual contract. See CBA, Art. 8, § 16.

8. Article 22, section 8 of the CBA provides for progressive discipline for teachers in the following four steps: (1) verbal reprimand (with written notation placed in the site file); (2) written reprimand (filed in personnel and site files); (3) suspension with or without pay; and (4) dismissal. The CBA makes clear that progressive discipline must be followed, "except in cases that constitute a real immediate danger to the district or [involve a] flagrant violation."

February 11, 2019 (the February 11 Incident)

9. This proceeding arises from an incident that occurred on February 11, 2019, after lunch in Respondent's ESE classroom. The School Board alleges Respondent intentionally threw a foam or Nerf-type football at a student in a wheelchair when he failed to follow her instructions, and the football hit the student. Respondent asserts she playfully threw stress ball-type footballs up in the air and one accidently bounced and hit A.R.'s chair.

10. Respondent's classroom at the High School consisted of ten to 12 ESE students during the 2018-2019 school year. These students had special needs and some were nonverbal. On the day of the incident, there were nine or ten students in Respondent's classroom, including A.R., a high school senior with cerebral palsy.

11. Respondent kept small foam or Nerf-type footballs in her desk drawer. The testimony at the hearing established

Respondent had used them in the classroom to get the students' attention in a playful fashion.

12. In addition to Respondent, four paraprofessionals assisted the students in the classroom. Of the four, only three were in the classroom during the February 11 incident: Ms. Walker, Mr. Blevins, and Ms. Murray.

13. Respondent was responsible for A.R. while in her classroom. A.R. uses a wheelchair or a walker to get around, but has a special chair-desk in Respondent's classroom. A.R. had difficulty in the classroom setting. Specifically, it was noted at the hearing that he has trouble processing what is happening around him, and that he needs help simplifying tasks that require more than one step.

14. Although A.R. is verbal, he is slow to respond. A.R. was described as a "repeater" because he repeats things that others say, smiles if others are smiling, or laughs if others are laughing. In conversation, A.R. would typically smile and nod, or say "yes."

15. Ms. Walker's and Mr. Blevins's recollections of the February 11 incident were essentially the same. They testified that on the afternoon of February 11, 2019, the students returned to Respondent's classroom from art class. They were excited and did not settle down for their lesson. As a result, Respondent became frustrated and yelled at the students to get their pencils

so they could start their work. Respondent asked A.R., who was in his special chair-desk, to obtain a pencil. A.R. did not respond immediately and Respondent told him to get his pencil or she would throw a football.

16. Ms. Walker's and Mr. Blevins's testimony established that, at this point, Respondent threw either one or two blue, soft, Nerf-type footballs approximately six inches long at A.R., who was looking in another direction. One of these blue footballs hit A.R. either in the side of his torso or back. A.R. began flailing his arms while he was in his chair-desk, and the entire room became silent.

17. Ms. Murray was not facing A.R. during the incident, but she heard Respondent yell at A.R. to pay attention. She did not see Respondent throw the balls and was unsure if any of the balls made contact with A.R. After the incident, however, she saw two balls on the floor, picked them up, and returned them to Respondent. Ms. Murray did not recall the color of the footballs, and could only describe them as "squishy."

18. Respondent testified that A.R. was not paying attention, and she admits she told him she was going to toss the footballs if he did not get his pencil. She denies throwing a blue football at A.R., but instead claims she threw two smaller foam brown footballs. She denied any of the balls hit him, but

rather, explained one of the brown footballs bounced off the floor and hit A.R.'s chair-desk; the other fell on her desk.

19. The undersigned finds the testimony of Respondent less credible than the paraprofessionals' testimony. First, all of the evidence established Respondent clearly threw footballs after A.R. did not respond to her instruction, and Respondent knew (or should have known) that A.R. was incapable of catching the football or responding positively.

20. Second, Respondent's version of what happened to the balls after she threw them is inconsistent with the testimony of Ms. Walker and Mr. Blevins that one ball hit A.R. Respondent's testimony that one ball fell on her desk is also inconsistent with Ms. Murray's testimony that she picked up two balls off the floor.

21. Finally, Respondent's version of events is not believable in part, because neither the brown nor the blue football entered into evidence had sufficient elasticity (or bounciness) to have acted in the manner described by Respondent.

22. Based on the credible evidence and testimony, the undersigned finds Respondent intentionally threw the blue larger footballs at A.R. knowing he would not be able to catch them, one ball hit A.R. in the side or back, and A.R. became startled from being hit. There was no evidence proving A.R. was physically, emotionally, or mentally harmed.

Report and Investigation of the February 11 Incident

23. Both Ms. Walker and Mr. Blevins were taken aback by Respondent's behavior. Ms. Walker was concerned that A.R. did not realize what was happening, and that the rest of the students were in shock. She did not think a teacher should throw anything at any student.

24. Mr. Blevins similarly stated he was stunned and did not believe Respondent's conduct was appropriate, especially because A.R. was in a wheelchair. At the hearing, Respondent also admitted it would be inappropriate to throw anything at a student even if it was just to get his or her attention.

25. Both Ms. Walker and Mr. Blevins attempted to report the incident immediately to the High School administration. Ms. Walker left the classroom to report the incident to Principal Bremer, who was unavailable. Ms. Walker then reported to Assistant Principal Langston what she had seen happen to A.R. in Respondent's classroom. During this conversation, Ms. Walker was visibly upset.

26. After listening to Ms. Walker, Assistant Principal Langston suggested she contact the Department of Children and Families (DCF). Ms. Walker used the conference room phone and immediately contacted the abuse hotline at DCF. As a result, DCF opened an abuse investigation into the incident.

27. Meanwhile, Mr. Blevins had also left Respondent's classroom to report the incident to Assistant Principal Langston. When he arrived, he saw that Ms. Walker was already there and assumed she was reporting what had happened. Therefore, he did not immediately report anything.

28. Later that day, Assistant Principal Langston visited Respondent's classroom, but did not find anything unusual. She did not speak to Respondent about the incident reported by Ms. Walker.

29. The next day, February 12, 2019, Assistant Principal Langston obtained statements from the paraprofessionals, including Ms. Walker and Mr. Blevins in Respondent's classroom regarding the February 11 incident. These statements were forwarded to Superintendent Cline, who had been advised of the incident and that DCF was conducting an investigation.

30. It is Superintendent Cline's practice to advise administrators to place a teacher on suspension with pay during an investigation. If the teacher is cleared, the administrator should move forward with reinstatement.

31. In this case, Principal Bremer met with Respondent on February 12, 2019, and informed her she would be placed on suspension with pay while DCF conducted its investigation into the incident.

32. DCF closed its investigation on February 19, 2019. No one who conducted the DCF investigation testified at the hearing, and the final DCF report was not offered into evidence. Rather, the School Board offered a DCF document titled "Investigative Summary (Adult Institutional Investigation without Reporter Information)." This document falls within the business records exception to the hearsay rule in section 90.803(6), Florida Statutes, and was admitted into evidence.

33. The undersigned finds, however, the Investigative Summary unpersuasive and unreliable to support any findings. The document itself is a synopsis of another report. Moreover, the document is filled with abbreviations and specialized references, but no one with personal knowledge of the investigation explained the meaning of the document at the final hearing. Finally, the summary indicates DCF closed the investigation because no physical or mental injury could be substantiated.

34. On February 21, 2019, Principal Bremer notified Superintendent Cline that DCF had cleared Respondent, but did not provide him with a copy of the DCF report or summary. Principal Bremer did not have to consult with Superintendent Cline regarding what action to take regarding Respondent.

35. Based on the DCF finding that the allegation of abuse or maltreatment was "Not Substantiated," Principal Bremer

reinstated Respondent to her position as an ESE teacher, but still issued her a written reprimand.

36. The reprimand titled "Improper Conduct Maltreatment to a Student" stated in relevant part:

> I am presenting you with this written reprimand as discipline action for your improper conduct of throwing foam balls at a student.
>
> On February 11, 2019 it was reported you threw a football at [A.R.], a vulnerable adult suffering from physical limitations. As a result of this action, Florida Department of Children and Families (DCF) were called to investigate and you were suspended until the investigation was complete.
>
> Although maltreatment of [sic] Physical or Mental Injury was not substantiated, DCF reported three adults in the room witnessed you throwing at least two foam balls at [A.R.] because he did not get a pencil on time. Apparently [A.R.] did not follow through with the direction provided by you and you became frustrated for that reason.
>
> I am by this written reprimand, giving you an opportunity to correct your improper conduct and observe Building rules in the future. I expect you will refrain hereafter from maltreatment to a student and fully meet the duties and responsibilities expected of you in your job. Should you fail to do so, you will subject yourself to further disciplinary action, including a recommendation for immediate termination and referral of the Professional Practices Commission.

37. On February 25, 2019, Respondent returned to her same position as an ESE teacher, in her same classroom, with the same students, including A.R.

Superintendent's Investigation and Recommendation to Terminate

38. Meanwhile, Superintendent Cline requested a copy of the report of the investigation from DCF and contacted the DCF investigator. Based on his review of what was provided to him and his conversation with DCF, he concluded A.R. may still be at risk. Superintendent Cline found Respondent's actions worthy of termination because "it is unacceptable to throw a football at a student who has cerebral palsy, and thus, such conduct violates" state rules and School Board policy. School Board PRO at 15, ¶ 72.

39. There was no credible evidence at the hearing that A.R. or any other student was at risk from Respondent. The School Board failed to establish at the hearing what additional information, if any, Superintendent Cline received that was different from the information already available to him, or that was different from the information provided to Principal Bremer. There was no justification or plausible explanation as to why Superintendent Cline felt the need to override Principal Bremer's decision to issue a written reprimand for the violations.

40. On March 6, 2019, Superintendent Cline issued a letter suspending Respondent without pay effective March 8, 2019, and indicating his intent to recommend to the School Board that it terminate Respondent's employment at its next regular board meeting on March 26, 2019. Attached to the letter were copies of the Investigative Summary, Florida Administrative Code Rule 6A-10.081, and School Board Policy 3210.

41. This letter was delivered by a School Board's human resources employee to Respondent on March 8, 2019. Respondent did not return to the classroom for the remainder of the school year.

Respondent's Disciplinary History

42. Prior to the February 11 incident, Respondent had received an oral reprimand for attendance issues on December 21, 2018.

43. On February 6, 2019, Assistant Principal Langston met with Respondent to address deficiencies in Respondent's attendance, lesson plans, timeliness of entering grades, and concerns with individual education plans for her ESE students. At that meeting, Assistant Principal Langston explained Respondent would be put on an improvement plan and that if Respondent did not comply with the directives discussed at the meeting, she would be subject to further discipline, including termination. Although the plan was memorialized, Respondent was

not given the written plan until after she returned from the suspension.

Ultimate Findings of Fact

44. Respondent intentionally threw two footballs in an overhand manner at A.R., a student who could not comprehend the situation and could not catch the balls. She did so either in an attempt to garner the student's attention or out of frustration because he was not following directions.

45. Respondent did not violate rule 6A-10.081(2)(a)1., because there was no evidence the incident exposed A.R. to harm, or that A.R.'s physical or mental health or safety was in danger. Similarly, Respondent did not violate School Board Policy 3210(A)(1).

46. Respondent violated rule 6A-10.081(2)(a)5., which prohibits a teacher from "intentionally expos[ing] a student to unnecessary embarrassment or disparagement." The evidence established Respondent's action in throwing the ball was intentional and was done to embarrass or belittle A.R. for not following her directions. For the same reason, Respondent's conduct violated School Board Policy 3210(A)(5).

47. Respondent violated rule 6A-10.081(2)(a)7., which states that a teacher "[s]hall not harass or discriminate . . . any student on the basis of . . . handicapping condition . . . and shall make reasonable effort to assure that each student is

protected from harassment." Again, the credible evidence established the act of a teacher throwing any item at any student, especially one who requires a wheelchair, is inappropriate and would be considered harassment on the basis of a student's handicap.

48. Similarly, Respondent violated rule 6A-10.081(2)(c)4., which requires that a teacher "not engage in harassment or discriminatory conduct which unreasonably interferes . . . with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination." For the same reasons listed above, Respondent's conduct also amounts to a violation of School Board Policy 3210(A)(7).

49. There was no evidence this conduct constituted a real immediate danger to the district, nor does it rise to the level of a flagrant violation. Therefore, the School Board must apply the steps of progressive discipline set forth in article 22, section 8 of the CBA.

50. Pursuant to the terms of the CBA, Respondent should have received a written reprimand for the February 11 incident.

CONCLUSIONS OF LAW

51. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

52. Respondent is a classroom teacher and her employment with the School Board is governed by an instructional staff contract. §§ 1012.01(2)(a) and 1012.33, Fla. Stat. The terms of her employment are also governed by the CBA.

53. The School Board is authorized to suspend or dismiss instructional personnel pursuant to sections 1012.22(1)(f), 1012.33(1)(f), and 1012.33(6)(a), Florida Statutes, but only for just cause. These statutes and rules are penal and therefore must be strictly construed, with ambiguities resolved in favor of the person charged with violating them. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013); Broward Cnty. Sch. Bd. v. Tersigni, Case No. 13-2900 (Fla. DOAH Oct. 9, 2014).

54. The School Board bears the burden of proving by a preponderance of the evidence that the alleged misconduct occurred and just cause exists to terminate Respondent's employment. Cropsey v. School Bd. of Manatee Cnty., 19 So. 3d 351, 355 (Fla. 2d DCA 2009).

55. As an initial matter, the undersigned must determine whether Respondent's conduct constitutes "just cause" for

dismissal. Florida Administrative Code Rule 6A-5.056 provides in pertinent part:

> "Just cause" means cause that is legally sufficient. Each of the charges upon which just cause for a dismissal action against specified school personnel may be pursued is set forth in sections 1012.33 and 1012.335, F.S. In fulfillment of these laws, the basis for each such charge is hereby defined:
>
> * * *
>
> (2) "Misconduct in Office" means one or more of the following:
>
> * * *
>
> (b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;
>
> (c) A violation of the adopted school board rules.

56. At the hearing, Superintendent Cline indicated he believed Respondent had violated rule 6A-10.081 (2)(a)1., (2)(a)5., and (2)(c)4. These rule provisions correspond to School Board Policy 3210(A)(1), (5), and (7).

57. Rule 6A-10.081(2)(a)1. requires that a teacher "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."

58. Rule 6A-10.081(2)(a)5. requires that a teacher "not intentionally expose a student to unnecessary embarrassment or disparagement."

59. Rule 6A-10.081(2)(c)4. requires that a teacher "not engage in harassment or discriminatory conduct which unreasonably interferes . . . with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination." In the same vein, rule 6A-10.081(2)(a)7. requires that a teacher "not harass . . . any student on the basis of . . . handicapping condition . . . and shall make reasonable effort to assure that each student is protected from harassment."

60. As found above, there was no evidence A.R. was ever in danger or harm and thus the School Board failed to satisfy its burden in establishing a violation of rule 6A-10.081(2)(a)1.

61. The School Board did, however, establish that Respondent's conduct was intended to or had the effect of harassing, embarrassing and intimidating A.R., who could not respond because of his disability. As such, the School Board met its burden in establishing the remaining state rule and School Board policy violations.

62. Having proved Respondent guilty of some violations, the School Board wishes to skip the four-step disciplinary process and go straight to dismissal. It insists progressive discipline was not necessary in this case.

63. The CBA requires progressive discipline except where there is an immediate danger to the district or other flagrant violation. Although "immediate danger" and "flagrant violation" are not defined in the CBA, whether conduct is severe enough to skip progressive discipline is a question of ultimate fact for the undersigned to determine based on the competent, substantial record evidence. See Costin v. Fla. A & M Univ. Bd. of Trs., 972 So. 2d 1084, 1086-1087 (Fla. 5th DCA 2008)(holding whether employee's misconduct justified dismissal based on terms of the university's progressive discipline rule was "an 'ultimate fact' best left to" the ALJ).

64. Cases involving other CBAs with similar language have referred to this type of exception to progressive discipline as requiring "severe acts of misconduct," Quiller v. Duval County School Board, 171 So. 3d 745, 746 (Fla. 1st DCA 2015), or circumstances "which clearly constitute . . . purposeful violations of reasonable School Board rules." Palm Bch. Cty. Sch. Bd. v. Harrell, Case No. 16-6862 (Fla. DOAH Apr. 11, 2017)(noting striking a child in anger constituted a sufficient justification to deviate from progressive discipline); Sarasota

Cnty. Sch. Bd. v. Berry, Case No. 09-3557 (Fla. DOAH Jan. 27, 2010; Dade Cnty. Sch. Bd. Mar. 4, 2010)(finding teacher's threat of violence was a flagrant violation within the meaning of the CBA justifying termination without progressive discipline); Lee Cnty. Sch. Bd. v. Bergstresser, Case No. 09-2414 (DOAH Sept. 25, 2009; Lee Cnty. Sch. Bd. Oct. 20, 2009)(finding just cause for immediate termination, as opposed to progressive discipline, based on teacher's refusal to do assigned tasks, harassment of coworkers, and threats of violence); compare Palm Bch. Cty. Sch. Bd. v. Barber, Case No. 17-6849TTS (Fla. DOAH November 13, 2018)(finding progressive discipline was not excused where teacher violated policy by dragging student across the floor; student was disrespected, but not in harm or danger).

65. Here, the evidence did not demonstrate conduct sufficiently egregious to justify dismissal without resort to the lesser prescribed discipline in the CBA. Although Respondent's actions were inappropriate, it is unreasonable to infer that the foam footballs, which had been used playfully in the classroom, could have caused any physical harm. Moreover, there was no evidence Respondent intended to harm A.R., or that A.R. was placed in any danger.

66. Since Petitioner has been disciplined with a verbal reprimand, the next level of discipline under the CBA is a written reprimand. Therefore, Petitioner should have received a

written reprimand, instead of a suspension without pay for the remainder of the 2018-2019 school year and termination.

67. The School Board established Superintendent Cline may have discretion to decline renewal of Respondent's annual contract for the 2019-2020 school year based on her performance deficiencies and placement on an improvement plan, but that issue was not addressed by Respondent in her PRO, nor was it included within this proceeding. Therefore, the undersigned does not make a recommendation as to whether the School Board should renew Respondent's annual contract.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the DeSoto County School Board:

a) enter a final order finding Respondent violated Florida Administrative Code Rule 6A-10.081(2)(a)5., and (2)(c)4.; and corresponding School Board Policy 3210(A)(5) and (7);

b) rescind the notice of termination dated March 6, 2019, and, instead, reinstate Principal Bremer's written reprimand dated February 25, 2019; and

c) to the extent there is a statute, rule, employment contract, or Collective Bargaining Agreement provision that authorizes back pay as a remedy for Respondent's wrongful suspension without pay, Respondent should be awarded full back

pay and benefits from March 8, 2019, to the end of the term of her annual contract for the 2018-2019 school year. See Sch. Bd. of Seminole Cnty. v. Morgan, 582 So. 2d 787, 788 (Fla. 5th DCA 1991); Brooks v. Sch. Bd. of Brevard Cnty., 419 So. 2d 659, 661 (Fla. 5th DCA 1982).

DONE AND ENTERED this 13th day of August, 2019, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
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Filed with the Clerk of the
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this 13th day of August, 2019.

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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.