

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD CORCORAN, AS COMMISSIONER
OF EDUCATION,

Petitioner,

vs.

Case No. 19-6071PL

THOMAS MASTERS,

Respondent.

_____ /

RECOMMENDED ORDER

On February 11 and 12, 2020, Administrative Law Judge W. David Watkins of the Division of Administrative Hearings (Division) conducted a hearing in this proceeding in St. Augustine, Florida.

APPEARANCES

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

For Respondent: Heidi B. Parker, Esquire
Egan, Lev, Lindstrom & Siwica, P.A.
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STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent, Thomas Masters, violated section 1012.795(1)(j), Florida Statutes, and Florida Administrative Code Rules 6A-10.081(2)(a)1 and 6A10.081(2)(a)5, as charged in the Administrative Complaint; and, if so, what disciplinary penalty should be imposed.

PRELIMINARY STATEMENT

On September 5, 2019, Petitioner, Richard Corcoran, as Commissioner of Education (Petitioner or Commissioner), filed an Administrative Complaint against Respondent, alleging violations of section 1012.795(1)(j) (Count 1), rule 6A-10.081(2)(a)1. (Count 2), and rule 6A-10.081(2)(a)5 (Count 3).

Respondent timely filed an Election of Rights form, disputing the allegations and requesting a hearing. On November 14, 2019, the Education Practices Commission (EPC) referred this matter to the Division for assignment of an administrative law judge. On December 6, 2019, the undersigned noticed this matter for final hearing on February 11 and 12, 2020, in St. Augustine, Florida.

On February 11, 2020, at Petitioner's request, the hearing was held at H.D. Hartley Elementary School (Hartley) for the convenience of the parents and students called to testify. On February 12, 2020, the hearing was held at the St. Johns County Courthouse.

Prior to the final hearing, the parties filed a Joint Pre-hearing Statement, in which they stipulated to certain facts. To the extent relevant, the parties' stipulated facts have been incorporated in the findings below.

On February 10, 2020, Petitioner filed a motion for leave to amend the Administrative Complaint based upon newly discovered evidence. Respondent opposed the motion. On the day of the final hearing, the undersigned heard argument from counsel for both parties. The motion was denied.

On February 11 and 12, 2020, the undersigned conducted the final hearing. Petitioner presented the testimony of: Catherine Hutchins

(Associate Superintendent for Human Resources), Antonio Scott (Principal), Crystal Poticny (Teacher), Kimberly Sikes (Teacher), Kathleen Baker (Assistant Principal), parent S.P., student B.P., parent R.R., student T.R., parent J.R., student C.R., parent A.V., student M.V., Michael Dresback (Associate Superintendent for Support Services), and Dr. Paul Goricki (Principal). The undersigned admitted Petitioner's Exhibits 1 through 7, 9, 15, 16, 18, and 19 in evidence.

Respondent testified on his own behalf and presented the testimony of Amber Rewis Phillips, Susan Jane Joyner, Danielle Sisk, Bettina Timmerman, Trevor Wezkiewicz, Rhieanna DeGrande, Robert K. Mathis, John Samuels, and Carolyn Dubowsky. The undersigned admitted Respondent's Exhibits 1 through 11 in evidence.

The two-volume Transcript was filed with the Division on March 9, 2020. After one extension, the parties timely submitted Proposed Recommended Orders on March 30, 2020.

Except where otherwise indicated, all references to the Florida Statutes in this Recommended Order are to the 2018 edition. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441, 444 (Fla. 5th DCA 2013) (holding that statutes and rules in effect at the time of the allegations apply, unless otherwise specified).

FINDINGS OF FACT

Based upon the credibility of the witnesses and evidence presented at the final hearing and on the entire record of this proceeding, the following Findings of Fact are made:

Background

1. Respondent holds Florida Educator's Certificate 743504, covering the areas of elementary education and physical education, which is valid through June 30, 2024.

2. The Commissioner is the head of the state agency, the Florida Department of Education, responsible for investigating and prosecuting allegations of misconduct against individuals holding Florida educator certificates. Upon a finding of probable cause, Petitioner is then responsible for filing a formal complaint and prosecuting the complaint pursuant to chapter 120, Florida Statutes, if the educator disputes the allegations in the complaint.

3. Since 1994, Respondent has been responsible for the care and development of elementary school-aged children. He became certified to teach elementary education in Florida in 1995, and at that time began teaching physical education (P.E.) for the Archdiocese of Miami. In approximately 1999, Respondent was certified in P.E. He taught P.E. for 19 years and theology for one year. He was the Athletic Director for 18 of those 20 years. Respondent has received no prior Department of Education (DOE) discipline.

4. Respondent's duties as Athletic Director for the Archdiocese included recruiting volunteer coaches, setting schedules, making sure that the teams were outfitted, securing referees, designing uniforms, improving play spaces, begging for equipment, soliciting donations, and making sure the coaches did a good job.

5. In 2015, Respondent relocated from south Florida to St. Johns County to assist with the care of his mother after his father's passing. He taught PE in the St. Johns County School District (SJCSD) from 2015 through 2019.

6. In the 2015-2016 school year, Respondent worked at PVPV-Rawlings Elementary School (PV) in a half-day position and in the after-care program. The principal of PV, Kathleen Furness, evaluated Respondent as "effective." At the conclusion of the school year, Ms. Furness recommended Respondent

to the principal at Hartley, Joy Taylor. Ms. Furness did not want him to leave PV, but the school did not have an opening for him. Ms. Furness told Susan Joyner, a third grade teacher at Hartley, that Hartley was getting “the best of the best.”

7. At the time of the allegations in the Administrative Complaint, Respondent was employed as a P.E. teacher at Hartley in the SJCS D. He was the P.E. teacher for kindergarten through fifth grade and the only P.E. teacher at the school. Teachers would take their students to P.E. at various times during the week, leave them with Respondent, and come back to get them after their P.E. session. During his time at Hartley, Respondent had a new principal each year. During the 2016-2017 school year, Hartley’s principal was Joy Taylor. During the 2017-2018 school year, Hartley’s principal was Antonio Scott. During the 2018-2019 school year, Hartley’s principal was Dr. Paul Goricki.

The 2016-2017 School Year

8. In the 2016-2017 school year, Respondent was hired as the P.E. teacher at Hartley after the school’s long-time P.E. instructor, Coach Beech, retired. When Respondent was hired at Hartley, he noticed that the teachers there were physically affectionate with the students, hugging regularly. School administrators and teachers testified that students regularly hugged teachers. Hartley administration accepted the practice of student-teacher hugs.

9. Amber Phillips holds a degree in elementary education and holds a teaching certificate in elementary education. Ms. Phillips has been teaching first and second grade at Hartley since 2012. Ms. Phillips testified that the younger the students, the more affectionate they are. Children wanted to be comforted and loved. Ms. Phillips testified that appropriate touch is beneficial to student mental health and learning. Respondent was told when he was hired that he fit in at Hartley because he was warm and caring.

10. Respondent immediately helped to increase the students's activity level and interest in physical activity. By all accounts, Respondent created an excellent P.E. program for his students. He emphasized the importance of physical fitness standards, and instituted the Presidential Physical Fitness Award Program which involved rigorous physical fitness training and testing. Respondent competed with his students by racing and challenging them, and by telling them he could do more sit-ups or push-ups than they could. Respondent played basketball with the students during recess.

11. Joy Taylor, Hartley's Principal, evaluated Respondent as effective in his 2016-2017 evaluation stating, "You have been one of my 'most valuable acquisitions.' You have brought so much positive energy and fitness to Hartley for which I am so grateful. From fund raising to field day, physical fitness tests to basketball team ... you have gone out of bounds to bring fun and fitness to our school. I appreciate all your hard work, care and commitment to our students, staff and school!"

12. According to Amber Lewis, a second grade teacher at Hartley during this school year, when Respondent started teaching at Hartley, "he really instilled physical fitness back into them and just wanted them [sic] to be healthy and get plenty of exercise but also encourage them by coaching the kids' [sic] basketball team and going to kids' [sic] events after school, and really pitching [sic] in wherever he needed to be. Doubling up and tripling up in classes and they were all happy to go with him any time."

13. Respondent's P.E. classes were loud, fast-paced, and action packed. The indoor routines included sit-ups, push-ups, or stretches. The outdoor routines included dynamic or static stretching, jogging, skipping, or galloping.

14. Respondent was a physical and hands on P.E. teacher and coach. He paired students to do sit-ups. One student acted as an anchor to hold the other student's feet down. Anchoring activated more muscle groups to help

the student perform the activity. Respondent helped hold a student's feet down, lightly touching his feet to assist the student in doing sit-ups.

15. Respondent frequently gave his students high-fives and handshakes. When his students hugged him, he tried to redirect them by telling them to let go, raising his arms to get them to release their hug, continuing to walk until they let go, or redirecting them to a side hug. Occasionally he would have to put his hand on their head in an attempt to let them know that they should let go of him.

16. In P.E. class there was more of a risk of harm from physical contact. Respondent's students played sports, including flag football and basketball. Respondent prevented collisions between his students, sometimes using physical contact. Students ran into him and he caught them when they would bounce off of him. Respondent would occasionally have to break up altercations between students in his P.E. classes. Respondent was concerned with safety in his class and went over the rules and expectations and gave instruction on the safe use of equipment.

17. Respondent built relationships with his students. He listened to them and took an interest in their activities outside of class. He let his students know that they were important and special. The evidence established that the vast majority of students appeared to enjoy P.E., and liked Respondent.

18. Several Hartley teachers and parents of Hartley students testified on Respondent's behalf. Those witnesses testified that they observed only positive interactions between Respondent and the students. All agreed Respondent had made many positive contributions to Hartley's culture and was a positive influence on the students. These witnesses never observed anything inappropriate between Respondent and any students, and none saw Respondent tickle students or pull their hair.

19. Rhieanna DeGrande, a parent of two Hartley students, testified that she saw Respondent every day from 2016 through 2019 during the school year. She never saw him do anything unsafe or inappropriate. However, she

did see him give the students high-fives and hugs, and sometimes the students would “latch onto his legs ... they loved him.” Ms. DeGrande heard from other parents and some teachers that Respondent was doing a great job, that he brought a lot of new activities to Hartley, and that he was very involved and loved the kids.

20. Retired St. Johns County Circuit Court Judge and State Attorney Robert Mathis met Respondent in 2016. Judge Mathis volunteered to help coach the basketball team that his grandson joined, and witnessed Respondent regularly interact with the students.

21. Judge Mathis testified that Respondent took care of the kids when they were injured and did not call children babies and tell them to stop crying. He never yelled at the children or was mean to the children. He did not pull their hair or tickle them. He picked them up when they fell down. Respondent patted the kids on the back when they did a good job, and he touched them when he showed them playing technique. Judge Mathis heard good things from the parents; they liked the way their kids responded to Respondent’s coaching. When Judge Mathis heard rumors about Respondent, he wrote a letter to Tim Forson, the Superintendent of SJCSD, and to Hartley’s Principal Goricki. In his letter, Judge Mathis wrote about the positive relationships that he witnessed between the students and Respondent, and about Respondent’s positive impact as a coach.

22. But Respondent was not without his detractors. Crystal Poticny is a kindergarten teacher at Hartley. Ms. Poticny testified that during the 2016-2017 school year, she observed Respondent on numerous occasions “inappropriately interacting with students: touching their neck, shoulders, tickling, picking students up like a sack of potatoes, carrying students on his waist.” She further testified that she saw Respondent poking and squeezing students, and that sometimes the students were crying and yelling “put me down!” Ms. Poticny told Respondent “please stop, put them down, they don’t like that.”

23. Ms. Poticny testified that it made her uncomfortable to watch Respondent interact with students like that. Although Ms. Poticny warned Respondent about his behavior with students, it continued throughout the 2016-2017 school year. She reported her concerns to their principal, Joy Taylor.

The 2017-2018 School Year

24. Ms. Poticny also testified that during the 2017-2018 school year, Respondent's behavior with students was the same. She observed Respondent carrying a student on his hip while the student was yelling and screaming. Sometimes the students would be pushing him away and crying and yelling "put me down!" She reported her concerns to their principal, Antonio Scott.

25. Kimberly Sikes is a first-grade teacher at Hartley. When Respondent started at Hartley, Ms. Sikes thought he was a good fit. She testified that Respondent "did a lot for the P.E. program." However, Ms. Sikes observed Respondent force a student to the ground several times, then tell other students, "Everybody come over and look at so and so, he's crying like a two-year old." Ms. Sikes reported the incident to Mr. Scott. Later in the year, Ms. Sikes observed Respondent standing over the same boy, as the boy was crying, point in his face and say to the boy, "You're nothing but a little baby." Ms. Sikes told Respondent, "That's enough." She thought that after she reported her concerns to Mr. Scott during the 2017-2018 school year, the matter would be resolved.

26. During the week of February 26, 2018, several kindergarten teachers spoke with Mr. Scott regarding what they perceived to be inappropriate interactions between Respondent and some of the students. On March 2, 2018, Mr. Scott met with Respondent to discuss those concerns. One of the matters Mr. Scott addressed was an incident involving a student reporting that Respondent choked him. Respondent explained to Mr. Scott that "he had his hand on the child's neck, and the child held his hands, and then he could

pick them up like a magic stick.” Mr. Scott told Respondent he could not in jest touch children and play around, “we can’t treat children like they are our nieces and nephews or our own children.”

27. At the conclusion of the March 2, 2018, meeting, Mr. Scott believed he had forcefully made his point with this verbal warning to Respondent about such contact with students. However, just a week later, on March 9, 2018, Mr. Scott had to address another matter regarding Respondent touching a student. A student reported that “Respondent had taken her and forced her to the ground.” Mr. Scott asked Respondent about what the student reported. Respondent told Mr. Scott that the student was going to throw mulch at another student, therefore he felt it was necessary to do a “takedown move” on the student in order to disarm the student. The student was eight years old.

28. As a result of these March 2 and March 9 incidents, on March 9, 2018, Mr. Scott gave Respondent a letter of improvement. In the letter, Mr. Scott stated, among other things:

As we move forward, I expect you to:

1. An apology is to be given to the student who was forced to be seated.
2. It is recommended you enroll in a Crisis Prevention (CPI) course which is offered periodically by the district.
3. The administration is to be contacted for assistance if a student is causing a disruption or unsafe environment.

29. Mr. Scott also warned Respondent by telling him specifically, “your livelihood is in jeopardy, make sure that you act accordingly so that this does not force some other steps in terms of progressive discipline.”

30. Approximately five weeks later, Mr. Scott prepared his written evaluation of Respondent for the 2017-2018 school year, commenting as follows:

Tom:

Your commitment to elevating the school's PE program and willingness to go above and beyond has not gone unappreciated. In preparation for a successful 2018-2019 school year you are encouraged to carefully reflect on all feedback given to you either in person or in I-Observation. It has been a pleasure to work alongside you and to support you this year.

Antonio

31. Mr. Scott assigned a Final Summative Score of 3.39, a score placing Respondent on the high end of the effective scale.

The 2018-2019 School Year

32. In early November 2018, while in Respondent P.E. classroom, Ms. Sikes heard Respondent say to one of her students, B.P., "Hey, Big Head, Big Head." Ms. Sikes believed that B.P. had been in Respondent class long enough for Respondent to know his name. Ms. Sikes asked B.P. how it makes him feel for Respondent to call him "Big Head." B.P. responded, "It makes me sad." Ms. Sikes testified that to call a student "Big Head" is "degrading, it's humiliating." "Would you call the overweight kid, the fat kid in class. It's really no different than that."

33. While doing a writing assignment, B.P. and C.R. told Ms. Sikes that Respondent pulled their hair "to get them from one place to another and that he roughs them up or jacks them up and grabs his shirt and pulls it real fast. . .and it shakes them up back and forth." These statements were consistent with what she had seen in the past. Ms. Sikes reported the

students' statements to their parents and to Assistant Principal Kathleen Baker.

34. On October 31, 2018, Ms. Baker went to the playground to see Respondent regarding a behavior incident involving a student on his basketball team. While they were speaking, three female kindergarten students came up to Respondent to tell him that one of the girls (T.R.) was sad and was crying. Respondent took the little girl and tipped her upside down, holding her by the waist and told her to "tip that frown upside down." He then put her back down. T.R. was not laughing, but she stopped crying.

35. Ms. Baker wrote in a statement after the incident "[w]hile I was uncomfortable with this, I could tell he meant it to be in jest and that he thought it would cheer the girl up. I did not talk to him about the situation at the time due to multiple issues that had to be addressed immediately."

36. Susan Joyner taught elementary school for 37 years, and holds a degree in early childhood and elementary education. She taught kindergarteners for ten years. She retired at the end of the 2016-2017 school year. That year she taught third grade at Hartley and interacted frequently with Respondent. Ms. Joyner testified that her students loved Respondent, although he was a tough teacher and had high expectations of his students. According to Ms. Joyner, her students could not wait to go to P.E. class with Respondent, and after class were very excited about what they had done and what they had accomplished.

37. At hearing, Ms. Joyner was questioned on cross-examination about her reaction to the "turn that frown upside down" incident. She testified as follows:

A. Let me turn that frown upside down. I think that's pretty creative. And it's also—and I also think it's a distraction—so many problems are so minimal and for somebody to turn somebody upside down, a five-year-old and just have fun with them and—Listen, I'm old school. I started teaching a long time ago when every little remark and every

little thing that we said to students wasn't such a big deal.

Q. So that scenario that I just gave you, that's okay with you; is that right?

A. Well, you know, I would have had to have been there to witness it. Can you give me more details? So afterwards did the little girl stop crying and go off and play with the rest of her class and continue in the activity? What happened afterwards? I don't know. Did she go screaming to her teacher when the teacher picked her up? Was she balling her eyes up. You know, "Why did you pick me up and put me upside down." What did the other kids--I don't know. There's so many details that you are not telling me that I am not going to judge a teacher for trying to make a five-year-old happy. I'm not going to negatively judge them. If their intent was to turn their frown upside down, I'm not going to trash that teacher.

38. According to Ms. Sikes, even if it is not done with malice or intent to hurt the child, turning a student upside down "it's crossing the barrier of inappropriately touching students." It's common sense ... "as teachers we don't interact with children that way."¹

39. The next day, November 1, 2018, Ms. Baker received an email from Ms. Sikes. The email stated:

I am writing this letter on behalf of Nichole Poticny and myself with concerns of situations that have been occurring during our class' P.E. block. Two of my students have made me aware that Tom Masters has pulled their hair in an effort to move them to the corner of the room after getting out in a game, or touching other friends during a game. They also mentioned that he "pushes and shoves them." I have heard him directly call one of my students "big head," and when questioned he said,

¹ Respondent alleged that Ms. Poticny and Ms. Sikes had mounted a "campaign" against him. However, there is no evidence of any animus by these fellow teachers against him, nor evidence of any other motivation for them to mount such a campaign.

"I don't know his name. He has a big head so I call him big head." There are other instance that we have observed and we would like to further discuss with you in private.

Nichole and I would like to meet with you at your earliest convenience.

40. Ms. Baker met with Ms. Sikes on the morning of November 2, 2018. Ms. Sikes told Ms. Baker about what she observed and what the students had reported to her. Later that morning, the parents of B.P. arrived at the school and wanted to speak with an administrator. They told Ms. Baker that Respondent called B.P. "Big Head," that he is pulling B.P.'s hair and this is unacceptable and administration needed to do something about it.

41. C.R.'s mother also requested a meeting with Ms. Baker. They talked over the phone about Respondent pulling her son's hair.

42. On November 2, 2018, Ms. Baker interviewed Ms. Poticny regarding her concerns about Respondent. During that interview, Ms. Poticny told Ms. Baker that:

"Yesterday he took a little girl's head with both hands and shook her face because she said she had a headache.

He makes the Kindergarteners do 30 push-ups at the beginning of each class. If they don't have a partner, he is their partner and stands on their feet. If they don't do 30 push-ups, he puts them in the corner.

He is tickling kids all the time - their stomach, their neck, under their arms. He will grab them around the waist.

He has picked kids up and carried them under his arm."

43. Two hours following her interview with Ms. Poticny, Ms. Baker (and Kyle Dresback, an administrator with the District Office), met with Respondent to discuss the allegations. According to Ms. Baker's notes, at the meeting Respondent admitted to calling B.P. "Big Head," but stated he did not recall pulling students' hair. However, he did acknowledge patting students on the head and shoulder and grabbing basketball players by the shirt while demonstrating technique.

44. On November 5, 2018, Catherine Hutchins, the Director of Human Resources, received two telephone calls from parents regarding Respondent's interactions with their children. On November 6, 2018, Ms. Hutchins met with Respondent. When asked about turning T.R. upside down, Respondent admitted that he did it and stated that he "went too far" by doing that. When asked about calling B.P. "Big Head," Respondent told Ms. Hutchins "he had forgotten the boy's name so he just said "Hey, 'Big Head.'"

45. On November 7, 2018, Catherine Hutchins issued Respondent a letter of reprimand. The letter of reprimand reminded Respondent of the incidents of March 2, 2018 (putting his hands around a student's neck), March 9, 2018 (doing a "take down" move on an eight-year-old student), October 31, 2018 (turning student upside down), and reports of calling a student "Big Head" and pulling students' hair. The letter of reprimand informed Respondent that he was suspended without pay for two days, among other things, and directed "you will not put your hands on students during any P.E. class or when coaching students for any reason."

46. On December 14, 2018, Dr. Goricki issued Respondent a letter of reprimand for tickling a student "really hard" on his neck. This incident occurred at or around the same time Respondent received the November 7, 2018, letter of reprimand.

47. On January 15, 2019, Dr. Goricki issued Respondent a Final Letter of Reprimand. The letter of reprimand alleges that on January 9, 2019, Respondent forcefully pushed a student during a physical education class.

When presented the letter and requested to acknowledge receipt in writing, Respondent wrote at the bottom of the letter, "I do not agree with many parts of the content of this letter." The Administrative Complaint reflects that Respondent successfully grieved the Final Letter of Reprimand and the letter was rescinded. The evidence of record does not support a finding that Respondent inappropriately pushed a student during a P.E. class.

48. In March 2019, Dr. Goricki informed Respondent that he would not be renewed for employment for the 2019-2020 school year. Respondent left that meeting angry, and then began to contact parents and tell elementary school students that Dr. Goricki "fired him" and petitioned for their support. Because Respondent's communications were disruptive to the school environment, he was removed from campus before the end of the school year.

49. Despite being non-reappointed, and being removed from campus prior to the end of the school year, Principal Goricki's performance evaluation of Respondent, dated April 9, 2019, rated Respondent in the high range of "effective."

The Child Witnesses

50. Among the students who testified at the hearing were B.P. and T.R. During the 2018-2019 school year, these students were in kindergarten. It was obvious that these young children were shy and nervous about participating in this process. Some of the students became emotional during questioning, but the undersigned concludes that this was the result of being "placed in the spotlight" in a room full of serious-looking adults, as opposed to their feelings toward Respondent, who was also in the room.

51. When asked by his mother whether Respondent ever calls him by his name, B.P. said, "No, he only calls me 'Big Head.'" Ms. Sikes was a witness to at least one such incident. B.P. also told his parents that Respondent pulled his hair. B.P. credibly testified Respondent called him "Big Head."

52. Petitioner has established by clear and convincing evidence that Respondent called B.P. "Big Head," instead of his given name.

53. T.R. told her parents that Respondent tickled her and turned her upside down. She also told them that it scared her. It is undisputed that Respondent picked T.R. up by her waist and turned her upside down. Ms. Baker witnessed it and Respondent admitted it. T.R. testified that picking her up and turning her upside down made her a little scared. While the possibility exists that Respondent could have dropped T.R. when inverting her, he did not, and she was not harmed. Rather, she was startled, and stopped crying.

54. Petitioner has established by clear and convincing evidence that Respondent picked T.R. up by her waist and turned her upside down.

Corrective Measures

55. In the 2017-2018 school year, Principal Scott recommended that Respondent enroll in a crisis intervention prevention (CPI) course. However, when Respondent tried to enroll during the 2017-2018 school year, he was told that he could not enroll because "he was not on the team." The school administration decided who was on the behavior management team. Mr. Scott did not know that he needed to facilitate Respondent's enrollment in the CPI course.

56. In the 2018-2019 school year, Respondent was permitted to take the CPI course. In the course, Respondent was taught appropriate techniques to use on students when they were out of control. Those techniques included physical touch under certain circumstances. Ms. Hutchins agreed that there were circumstances when it was appropriate to touch students to keep them from harming themselves or other students. Ms. Sikes also testified that there were circumstances when touching students was appropriate.

57. Following his receipt of the November 7, 2018, reprimand, Respondent had a conversation with all of his Second to Fifth grade classes about the student/teacher relationship, boundaries, and appropriate touch.

58. Respondent attended six mandatory counseling sessions through the Employee Assistance Program. The purpose of the sessions was to assist Respondent with understanding the proper boundaries between student and teacher.

The Allegations in the Administrative Complaint

59. The Administrative Complaint alleges the following:

Just prior to and during the 2018/2019 school year, Respondent was put on notice not to touch students inappropriately multiple times when he received the following warnings and/or discipline:

a) On or about March 9, 2018, Respondent received a Letter of Improvement for putting hands on students.

b) On or about November 11, 2018, Respondent received a Letter of Reprimand for inappropriate hands on students.

c) On or about December 14, 2018, Respondent received a Letter of Reprimand for inappropriately touching a kindergarten student.

d) On or about January 15, 2019, Respondent received a Final Letter of Reprimand for pushing a second grade student. Respondent successfully grieved this discipline and the letter was rescinded.

During the 2018/2019 school year, Respondent ignored all warnings and inappropriately put his hands on students. Respondent's conduct included but may not have been limited to:

a) Respondent aggressively tickled students.

b) Respondent pulled students' hair in efforts to direct the students.

c) Respondent grabbed students by their shirts and pushed them against a wall.

d) Respondent lifted a female student off the ground and turned her upside down in an attempt to get her to stop crying.

During the 2018/2019 school year, Respondent repeatedly embarrassed B.P., a six-year-old, male student, by referring to B.P. as "Big Head."

60. It is found that Petitioner proved by clear and convincing evidence that Respondent inappropriately lifted a female student off the ground and turned her upside down in an attempt to get her to stop crying. Petitioner also proved by clear and convincing evidence that during the 2018-2019 school year, Respondent repeatedly embarrassed B.P., a six-year-old male student, by referring to B.P. as "Big Head." None of the other allegations contained in the Administrative Complaint were proven by clear and convincing evidence.²

CONCLUSIONS OF LAW

61. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019).

² Respondent defended his actions by arguing that there was a double standard for male teachers. This was implicitly acknowledged by Ms. Poticny, who testified "He's a male teacher interacting with other students." And Respondent being male was significant because there was a "history of incidences that have happened with students and [male] teachers. And it's the caution that we take, and it's spoken about amongst parents, amongst teachers, that you just never know. And so when I first went to Tom, I was kind of like looking out for him, don't do it, somebody could be watching, you just never know, just don't do it" Even if Respondent is correct that a double-standard exists based on gender, the actions proven herein would constitute violations, whether committed by a male or female teacher.

62. Respondent is substantially affected by Petitioner’s intended decision to discipline his Florida educator’s certificate and has standing to maintain this proceeding.

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

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

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

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

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

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

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

(7) A panel of the commission shall enter a final order either dismissing the complaint or imposing one or more of the following penalties:

(a) Denial of an application for a teaching certificate or for an administrative or supervisory endorsement on a teaching certificate. The denial may provide that the applicant may not reapply for certification, and that the department may refuse to consider that applicant's application, for a specified period of time or permanently.

(b) Revocation or suspension of a certificate.

(c) Imposition of an administrative fine not to exceed \$2,000 for each count or separate offense.

(d) Placement of the teacher, administrator, or supervisor on probation for a period of time and subject to such conditions as the commission may specify, including requiring the certified teacher, administrator, or supervisor to complete additional appropriate college courses or work with another certified educator, with the administrative costs of

monitoring the probation assessed to the educator placed on probation.

* * *

(e) Restriction of the authorized scope of practice of the teacher, administrator, or supervisor.

(f) Reprimand of the teacher, administrator, or supervisor in writing, with a copy to be placed in the certification file of such person.

(g) Imposition of an administrative sanction, upon a person whose teaching certificate has expired, for an act or acts committed while that person possessed a teaching certificate or an expired certificate subject to late renewal, which sanction bars that person from applying for a new certificate for a period of 10 years or less, or permanently.

(h) Refer the teacher, administrator, or supervisor to the recovery network program provided in s. 1012.798 under such terms and conditions as the commission may specify.

67. Charges in a disciplinary proceeding must be strictly construed, with any ambiguity construed in favor of the licensee. *Elmariah v. Dep't of Prof'l Reg.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); *Taylor v. Dep't of Prof'l Reg.*, 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Disciplinary statutes and rules must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden their application. *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 99-100 (Fla. 1st DCA 2008); *Dyer v. Dep't of Ins. & Treas.*, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

68. 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); *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits 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. Owner's Ass'n v. Dep't of Envtl. 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).

69. Count 1 of the Administrative Complaint seeks to discipline Respondent on charges that he violated section 1012.795(1)(j), which states:

(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.

Count 1 cannot constitute an independent violation, but rather is dependent upon a corresponding violation of the rules constituting the Principles of Professional Conduct.

70. Counts 2 and 3 of the Administrative Complaint seeks to discipline Respondent on charges that he violated rule 6A-10.081(2)(a)1. and rule 6A-10.081(2)(a)5., which states:

(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.

* * *

5. Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

71. Petitioner established, by clear and convincing evidence, that Respondent violated rule 6A-10.081(2)(a)1., in that Respondent failed to make a reasonable effort to protect the student from conditions harmful to the student's mental health, physical health, and safety. Turning a student upside down without her permission and calling a student "Big Head" rather than his given name violates rule 6A-10.081(2)(a)1.

72. The rule that Respondent is charged with violating in Count 3 requires a finding that the teacher "intentionally" exposed students to unnecessary embarrassment or disparagement. There can be no violation in the absence of evidence that the teacher made a conscious decision not to comply with the rule. *See Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995; *Jenkins v. State Bd. of Educ.*, 399 So. 2d 103 (Fla. 1st DCA 1981). There was no evidence whatsoever in the record to support such a conclusion regarding

Respondent's intent. While it was unprofessional to refer to a student as "Big Head" rather than his given name, or to physically invert a child, there is no evidence to support the conclusion that Respondent intended to embarrass or disparage the students. Accordingly, Respondent is not guilty of the rule violation charged in Count 3 of the complaint.

Recommended Penalty

73. Florida Administrative Code Rule 6B-11.007(2)(j)1. establishes the range of penalties for various violations of section 1012.795(1)(j) and rule 6A-10.081(2)(a)1., 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," "restrict scope of practice," "fine," and "administrative fees and/or costs" with applicable terms thereof as additional penalty provisions in each case in which neither a suspension or revocation is imposed, the penalty shall include a letter of reprimand. The terms "suspension" and "revocation" shall mean any length of suspension or revocation, including permanent revocation, permitted by statute, and shall include comparable denial of an application for an educator's certificate.

* * *

(j) Violating the Principles of Professional Conduct in violation of Section 1012.795(1)(j), F.S., by:

1. Failing to make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety [subparagraph 6A10.081(2)(a)1., F.A.C.] Reprimand – Revocation.

74. In its Proposed Recommended Order, Petitioner urges the undersigned to recommend a penalty of suspension of Respondent's educator's certificate for a period of 12 months from the date of the final order, and that Respondent be placed on probation for a period of 12 months after his suspension, with conditions to be determined by the EPC. Petitioner's proposed penalty assumes that all three counts of the Administrative Complaint have been proven, which they have not. Petitioner did not prove Count 3, the count that requires the violator to have *intentionally* exposed a student to unnecessary embarrassment or disparagement. Petitioner's proposed penalty is too severe, given the facts found herein.

75. In addition, rule 6B-11.007(3) establishes aggravating and mitigating factors to be applied to penalties calculated under the guidelines. Under the facts found herein, the penalty to be imposed on Respondent is mitigated by three factors set forth in rule 6B-11.007(3):

(e) The number of times the educator has been previously disciplined by the Commission;

(f) The length of time the educator has practiced and the contribution as an educator;

(j) Any effort of rehabilitation by the educator.

76. The un rebutted evidence established that Respondent has not previously been disciplined by the EPC. In addition, the evidence established that during his 20 years teaching under the Archdiocese of Miami, Respondent was never the subject of discipline for actions similar to those at issue herein.

77. Including his three years teaching for the SJCS D, Respondent has been a teacher for 23 years. The evidence established that throughout his teaching career, Respondent has been a caring and dedicated educator, and has richly contributed to the lives of his students.

78. Respondent made efforts at rehabilitation, including attending a crisis intervention program, counseling through the Employee Assistance Program, and discussing the student/teacher relationship, boundaries, and appropriate touch with his students.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that the Education Practices Commission enter a final order finding that Respondent violated section 1012.795(1)(j), and rule 6A-10.081(2)(a)1., that Respondent receive a Reprimand, and that he be placed on probation for a period of 12 months from the date of the final order, with conditions of probation to be determined by the Education Practices Commission.

DONE AND ENTERED this 28th day of April, 2020, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
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this 28th day of April, 2020.

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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.