STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 19-6580TTS

CARLOS M. SANJURJO,

Respondent.
_____/

## RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019),[1] by Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on March 17, 2020, by video teleconference at locations in Miami and Tallahassee, Florida.

## APPEARANCES

For Petitioner: Cristina Rivera, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 110
Clearwater, Florida 33761-1526

## STATEMENT OF THE ISSUE

Whether just cause exists, pursuant to section 1012.33, Florida Statutes,[2] to suspend Respondent from his employment as a teacher for ten days without pay.

[1] All references to chapter 120 are to the 2019 version.
[2] All references to chapter 1012 are to the 2018 version, which was in effect at the time of the alleged misconduct at issue in this proceeding.

## PRELIMINARY STATEMENT

On November 21, 2019, Petitioner, Miami-Dade County School Board, took action to suspend Respondent, Carlos M. Sanjurjo, from his employment as a teacher for ten days without pay. Respondent timely requested an administrative hearing and the matter was referred to DOAH on December 10, 2019, for assignment of an ALJ to conduct the final hearing. Pursuant to the Order Requiring Filing of Notice of Specific Charges, Petitioner filed its Notice of Specific Charges on January 17, 2020, setting forth the factual and legal grounds for the proposed discipline.

The final hearing was scheduled for, and held on, March 17, 2020. Petitioner presented the testimony of student S.D., Sandra Smith-Moise, Yvette Mestre, and Ana Mercedes Acevedo Molina. A Spanish language translator was duly sworn and translated Acevedo Molina's testimony for the record. Petitioner's Exhibits 1 through 6 and 9 were admitted into evidence without objection, and Petitioner's Exhibit 7 was admitted over objection. Respondent testified on his own behalf and did not tender any exhibits for admission into evidence.

The one-volume Transcript was filed at DOAH on April 27, 2020. Pursuant to the Deadline for Filing Proposed Orders, the parties were given until May 7, 2020, to file their proposed recommended orders. Both Proposed Recommended Orders were timely filed and duly considered in preparing this Recommended Order.

## FINDINGS OF FACT

Based on the credible and persuasive competent substantial evidence in the record, the following Findings of Fact are made:

I. The Parties

1. Petitioner, Miami-Dade County School Board, is charged with the duty to operate, control, and supervise free public schools in Miami-Dade County pursuant

to section 1001.32, Florida Statutes (2018), and article IX, section 4(b) of the Florida Constitution.

2. Respondent has been employed by Petitioner as a teacher since 2000. He has been employed as an art teacher at E.W.F. Stirrup Elementary School ("Stirrup") for the last 18 years, including when he is alleged to have engaged in the conduct that has given rise to this proceeding. Respondent is certified in art, graphic design, and vocational education.

II. Notice of Specific Charges

3. The Notice of Specific Charges ("NSC"), which constitutes the administrative complaint in this proceeding, alleges two instances of conduct on Respondent's part as the grounds for the proposed disciplinary action.

4. Specifically, the NSC alleges that on or about September 27, 2018, Respondent told a female 5th grade student words to the effect of "get out here; I do not want you here," and forcibly pushed her away with his hand.

5. The NSC also alleges that Respondent used profanity, spoken in Spanish—specifically, the words "mierda"[3] and "pinga"[4]—while covering a class of kindergarten students. The complaint alleges that two adults witnessed Respondent's use of these words.[5] This incident is alleged to have occurred on or about December 5, 2018.

6. Based on this alleged conduct, the NSC charges Respondent with misconduct in office, pursuant to Florida Administrative Code Rule 6A-5.056(2), for having violated specified provisions of rule 6A-10.081, Principles of Professional Conduct for the Education Profession; School Board Policy 3210, Standards of Ethical Conduct; and School Board Policy 3210.01, Code of Ethics.

III. Evidence Adduced at the Final Hearing

The September 27, 2018 Incident

[3] Translated into English, "mierda" means "shit."
[4] Translated into English, "pinga," as used in the context pertinent to this proceeding, means "fuck."
[5] As more fully discussed below, the NSC does not allege that Respondent's use of these words was directed at any students, or that any students saw or heard Respondent use these words.

7. On September 27, 2018, S.D., a minor, was a student in Respondent's 5th grade art class.

8. S.D. testified, credibly, that on that day, Respondent told her to "get out of his way," then pushed her away by placing his hands on her shoulders. She testified that Respondent's words and actions made her feel "embarrassed, or, like, weird."

9. S.D. acknowledged that she had gone up to Respondent and tried to talk to him while he was talking to the president of the Parent Teacher Association ("PTA"). She tried to get hand sanitizer and Respondent said to her "not now, go away" because he was talking to the PTA president at that time.

10. Respondent characterized S.D. as a child who "has a reputation for basically not obeying anything."

11. He testified that when S.D. approached his desk, he was in a discussion with the PTA president, and he told S.D. to "get out of here" and "sit down." He did not recall touching her. He stated that from where he was standing, he doubted that he could have reached her to push her away, and that had he pushed her, she likely would have fallen.

12. No other witnesses testified at the final hearing regarding this incident.

The December 5, 2018 Incident

13. On Wednesday, December 5, 2018, Respondent was assigned to cover another teacher's kindergarten class starting at 9:00 a.m., so that the teacher who regularly taught that class, Ms. Rivero, could attend an exceptional student education ("ESE") meeting regarding one of her students.

14. For the 2018-2019 school year, Respondent was assigned a full day of planning each Wednesday. In addition, Respondent was assigned one hour of planning every other day of the school week, per the Miami-Dade School District ("District") policy of providing teachers a minimum of one hour of planning per day.[6]

[6] Respondent was assigned a full day of planning on Wednesdays in the 2018-2019 school year. This was not a function of his having an extraordinary workload; rather, it was because on Wednesdays, the language arts classes were scheduled back-to-back and students were dismissed early, so that it was infeasible to schedule art classes on Wednesdays. As a result of this scheduling, Respondent enjoyed nearly four more hours of planning per week than the minimum planning time to which he was entitled under the District's planning policy.

According to Smith-Moise, if a teacher's schedule provides more than an hour of planning per day, that teacher may be requested, from time to time, to use that additional planning time for involvement in other school activities, including covering other teachers' classes as necessary.

15. The administration at Stirrup generally attempts to schedule substitute teachers to cover classes when a teacher is called away from his or her class; however, on December 5, 2018, another teacher's class already was being covered by a substitute teacher. Because Respondent had planning that entire day, he did not have classes, so was available to cover Rivero's class.

16. The length of ESE meetings varies, depending on the type of ESE service being delivered and whether the students' parents agree with the school district regarding the ESE services proposed to be provided. This particular meeting was an initial ESE team staffing meeting; these types of meetings often are relatively long compared to other types of ESE meetings.

17. Respondent covered Rivero's class on December 5, 2018, from approximately 8:35 a.m. until shortly after 1:00 p.m., when a substitute teacher was called to cover the class for the remainder of the ESE meeting.

18. During the time he was covering Rivero's class, Respondent called the Stirrup administration office multiple times, and also called and sent text messages to a fellow teacher, Yvette Mestre, asking how long the ESE meeting would take and when it would be over.

19. In response to Respondent's calls, Smith-Moise twice left the ESE meeting to speak to Respondent in Rivero's classroom. Both times, when she entered the classroom, she observed Respondent disengaged from the students and talking very loudly on his phone.

20. Respondent made clear to Smith-Moise that he was very frustrated at having his planning time taken to cover Rivero's class when he had other responsibilities to attend to.[7]

[7] Respondent testified that he had a great deal of work to do on a large mural project for his own classes that needed to be completed under a tight deadline.

21. Shortly after the beginning of the school day on December 5, 2018, Smith-Moise had taken a student from Rivero's class to Mestre's classroom because the student was misbehaving in Rivero's classroom. A short time thereafter, Respondent began sending text messages to Mestre, asking when the ESE meeting was going to be over. Mestre, who was occupied with teaching her own class, responded that she did not know, and suggested that Respondent contact the administration office. Around 10:30 or 11:00 a.m., Respondent began calling Mestre, again asking about the length of the ESE meeting. Mestre testified that "he seemed upset because he had stuff that he wanted to plan." Mestre again responded that she did not know and suggested that Respondent contact the administration office.

22. At some point, Mestre went to Rivero's classroom to retrieve a lunchbox for the student from Rivero's class whom she was supervising. When she entered the classroom, she observed Respondent on his phone. Respondent told Mestre that he was on the phone with his United Teachers of Dade ("UTD") representative and that he was upset at having to cover Rivero's class because it was his planning day.

23. Mestre went to the administrative office and reported to Smith-Moise that Respondent was upset and needed assistance in Rivero's classroom. Smith-Moise directed Mestre to take Acevedo Molina, an office assistant, to the classroom so that she (Acevedo Molina) could assist Respondent.

24. According to Mestre, when they entered the classroom, Respondent initially thought Acevedo Molina was going to take over supervision of the class; however, when Mestre informed him that Acevedo Molina was there to assist him but would not be taking over supervision of the class, Respondent became very irate, raised his voice, and used the words "mierda" and "pinga" in speaking to them.[8]

25. Acevedo Molina confirmed that Respondent used these words when he spoke to her and Mestre.

26. Mestre and Acevedo Molina were, respectively, "shocked" and "surprised" at Respondent's use of these words.

[8] Mestre testified that Respondent said, translated into English, "[t]he school doesn't understand the shit that I do," and "they don't give a fuck what I do in this school."

27. Respondent testified that he does not recall having said those words when he spoke to Mestre and Acevedo Molina that day.

28. There is conflicting evidence whether Respondent used those words inside the classroom, such that they were said within earshot of the students, or outside of the classroom, where the students would not be able to hear or see him use the words. Mestre and Acevedo Molina both testified that they had entered Rivero's classroom and were inside the classroom with Respondent when he used the words. Respondent claims that he had to have stepped outside of the classroom into the corridor to speak to Mestre and Acevedo Molina, because the door was locked and they would have been unable to open it and enter the classroom on their own.

29. In any event, it is unnecessary to determine whether Respondent used these words in the classroom within the students' earshot, because the NSC only charges Respondent with having said "mierda" and "pinga" while "covering a class of kindergarten students for another teacher," and that Respondent's use of these words was "overheard by two adult witnesses." The NSC does not allege that Respondent directed the words toward any students or that any students saw or heard him use these words.[9]

30. No direct or persuasive circumstantial evidence was presented showing that any students saw or overheard Respondent use those words. Although Mestre and Acevedo Molina testified that Respondent was inside the classroom when he said the words, both testified that the words were not directed toward the students, and neither testified that any students heard or saw Respondent say those words. Thus, even if the evidence conclusively established that Respondent was inside the classroom when he said those words—which it does not—that does not prove that any students saw or heard Respondent use those words. To that point, Smith-Moise

[9] *Trevisani v. Dep't of Health*, 908 So. 2d 1008, 1009 (Fla. 1st DCA 2005)(a respondent cannot be disciplined for offenses not factually alleged in the administrative complaint); *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla 1st DCA 1996)(predicating disciplinary action on conduct never alleged in an administrative complaint or some comparable pleading violates the Administrative Procedure Act). *See Hunter v. Dep't of Prof'l Reg.*, 458 So. 2d 842, 844 (Fla. 2d DCA 1984)(administrative complaint seeking to impose discipline must state, with specificity, the acts giving rise to the complaint).

testified that the school had not received any complaints about Respondent's use of those words from any of the students or their parents.

31. The UTD Contract establishes a policy of imposing progressive discipline ("Progressive Discipline Policy") when "the Board deems it appropriate, and . . . the degree of discipline shall be reasonably related to the seriousness of the offense." Neither the Progressive Discipline Policy nor Petitioner's adopted policies articulate a disciplinary "scale" or penalty categories applicable to specific types of conduct.

32. There is no competent substantial evidence in the record showing that Respondent previously has been subjected to disciplinary action by Petitioner.

33. Petitioner did not present any competent substantial evidence establishing the factual basis for its proposal to suspend Respondent for ten days for the offenses charged in the NSC.

IV. Findings of Ultimate Fact

34. As noted above, Petitioner has charged Respondent with misconduct in office under rule 6A-5.056(2) for having violated specified provisions of rule 6A-10.081, Principles of Professional Conduct for the Education Profession; School Board Policy 3210, Standards of Ethical Conduct; and School Board Policy 3210.01, Code of Ethics.

35. Whether an offense constitutes a violation of applicable statutes, rules, and policies is a question of ultimate fact to be determined by the trier of fact in the context of each violation. *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995)(whether particular conduct violates a statute, rule, or policy is a factual question); *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995)(whether the conduct, as found, constitutes a violation of statutes, rules, or policies is a question of ultimate fact); *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985)(whether there was a deviation from a standard of conduct is not a conclusion of law, but is instead an ultimate fact).

Charged Conduct and Rule Violations

A. The September 27, 2018 Incident

36. Based on the foregoing, it is determined, as a matter of ultimate fact, that Respondent pushed S.D. on September 27, 2018.

37. There was no justification for Respondent to place his hands on and push S.D., even if she interrupted him while he was speaking with another person.

38. Respondent's conduct in pushing S.D. constituted misconduct in office, as defined in rule 6A-5.056(2).

39. Specifically, Respondent's conduct did not comport with rule 6A-10.081(1)(a), which provides that his primary professional concern must be for the student, and requires him to exercise best professional judgment. In pushing S.D., he did not treat her as his primary professional concern, and he did not exercise best professional judgment.

40. Additionally, Respondent's conduct did not comply with rule 6A-10.081(2)(a)1. or School Board Policies 3210 and 3210.01. Specifically, in pushing S.D., Respondent did not make a reasonable effort to protect her from conditions harmful to her mental and physical health and safety. Although S.D. was not physically injured, she was embarrassed by Respondent's conduct in pushing her.

41. Respondent's conduct also did not comply with rule 6A-10.081(2)(a)5. or School Board Policies 3210 and 3210.01. Respondent's conduct in pushing S.D. was intentional and it exposed her to embarrassment.

42. Because Respondent's conduct in pushing S.D. violated rules 6A-10.081(1)(a)1. and (2)(a)1. and 5., and School Board Policies 3210 and 3210.01, it is found, as a matter of ultimate fact, that Respondent committed misconduct in office, pursuant to rule 6A-5.056(2).

43. Pursuant to the UTD Progressive Discipline Policy, it is determined that Respondent's conduct in pushing S.D. was sufficiently serious to warrant suspending him without pay for five days. There was no justification for him having pushed her. Although S.D. was not physically injured as a result of Respondent's conduct, the potential existed for her to have been injured had she fallen, and, in any event, Respondent's intentional action subjected her to embarrassment.

B. The December 5, 2018 Incident

44. Based on the foregoing findings, it is determined, as a matter of ultimate fact, that Respondent used the words "mierda" and "pinga," which are profane words, when speaking to Mestre and Acevedo Molina on December 5, 2018.

45. However, for the reasons discussed above, it is determined, as a matter of ultimate fact, that Respondent did not direct those words toward the students or that any students heard or saw him use those words.[10]

46. Respondent's use of profanity in speaking to Mestre and Acevedo Molina did not comport with rule 6A-10.081(1)(c). In using profanity toward his colleagues, Respondent did not strive to achieve and sustain the highest degree of ethical conduct. Mestre and Acevedo Molina both testified to the effect that they viewed his conduct as inappropriate in that professional setting.

47. Respondent's use of those words when speaking to Mestre and Acevedo Molina did not comply with the requirement in School Board Policy 3210 to refrain from the use of profane or abusive language in the workplace.

48. Respondent's use of those words when speaking with Mestre and Acevedo Molina also did not comply with the standard set forth in School Board Policy 3210.01, which requires the employee to show respect for other people.

49. In sum, Respondent's conduct in saying "mierda" and "pinga" while speaking to Mestre and Acevedo Molina violated rules 6A-10.081(1)(c) and School Board policies 3210 and 3210.01. Accordingly, Respondent's conduct constituted misconduct in office under rule 6A-5.056(2).

50. As discussed above, there is no competent substantial evidence establishing that Respondent has ever been subjected to discipline by Petitioner prior to this proceeding. Although Respondent's conduct in using profanity when speaking to two adult colleagues violates certain policies, in light of the UTD Progressive Discipline Policy, such violation is not sufficiently serious to warrant suspension without pay. Therefore, it is determined that, consistent with the concept of progressive

[10] Further, as discussed above, the administrative complaint does not charge Respondent with using those words toward students or charge that any students saw or heard him use those words.

discipline, Petitioner should issue a verbal reprimand to Respondent for his conduct in using profanity when speaking to his colleagues.

51. Because Respondent was not charged with, and the evidence did not prove, that he directed profanity toward any students or that any students saw or heard him use profanity, Petitioner may not impose discipline on Respondent on that basis.

Just Cause

52. Based on the foregoing, it is determined, as a matter of ultimate fact, that just cause exists to suspend Respondent.

Recommended Penalty

53. Based on the foregoing, it is determined that Respondent should be suspended for five days without pay for having pushed S.D.

54. Based on the foregoing, it is determined that Respondent should be issued a verbal reprimand for using profanity when speaking to Mestre and Acevedo Molina and Respondent should receive five days of back pay for the balance of the ten-day period for which Petitioner proposed to suspend him.

## CONCLUSIONS OF LAW

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

56. This is a disciplinary proceeding in which Petitioner seeks to suspend Respondent from his employment, without pay, for ten days.

57. This is a de novo proceeding designed to formulate agency action, not review agency action taken earlier and preliminarily. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 775 (Fla. 1st DCA 1981); *Capelleti Bros., Inc. v. Dep't of Transp.*, 362 So. 2d 346, 348 (Fla. 1st DCA 1978); *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Accordingly, the undersigned is charged in this proceeding with determining anew, based on the competent substantial evidence in the record, whether just cause exists to suspend Respondent from his employment.

58. Respondent is classified as "instructional personnel" as that term is defined in section 1012.01(2).

59. Section 1012.33(6)(a) states, in pertinent part, that "any member of the instructional staff may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a)." "Just cause" is "cause that is legally sufficient." Fla. Admin. Code R. 6A-5.056. Pursuant to section 1012.33(1)(a), just cause includes misconduct in office.

60. To suspend Respondent from his employment as a teacher, Petitioner must prove that he committed the alleged conduct, that the conduct violates the rules and policies cited in the administrative complaint, and that the violation of these rules and policies constitutes just cause to suspend him. *Dileo v. Sch. Bd. of Dade Cty.*, 569 So. 2d 883 (Fla. 3d DCA 1990). *See Balino v. Dep't of HRS*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)(unless provided otherwise by statute, the burden of proof is on the party asserting the affirmative of the issue).

61. The standard of proof applicable to this proceeding is a preponderance, or greater weight, of the evidence. *McNeill v. Pinellas Cty. Sch. Bd.*, 678 So. 2d 476, 477 (Fla. 2d DCA 1996); *Dileo*, 569 So. 2d at 884.

62. Petitioner has charged Respondent with committing misconduct in office. Rule 6A-5.056(2) defines "misconduct in office," in pertinent part, as:

* * *

> (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;
>
> (d) Behavior that disrupts the student's learning environment; or
>
> (e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

63. Rule 6A-10.081, the Principles of Professional Conduct for the Education Profession in Florida, prescribes standards of conduct applicable to instructional personnel. This rule states, in pertinent part:

> (1) Florida educators shall be guided by the following ethical principles:
>
> (a) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.
>
> (b) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.
>
> (c) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.
>
> (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.

6. Shall not intentionally violate or deny a student's legal rights.

64. School Board Policy 3210, Standards of Ethical Conduct, establishes Petitioner's standards of employee conduct. This policy states, in pertinent part:

> All employees are representatives of the District and shall conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.
>
> A. An instructional staff member shall:
>
> * * *
>
> 3.[M]ake a 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;
>
> * * *
>
> 7. [N]ot intentionally expose a student to unnecessary embarrassment or disparagement;
>
> 8. [N]ot intentionally violate or deny a student's legal rights;
>
> * * *
>
> 21. [N]ot use abusive and/or profane language or display unseemly conduct in the workplace[.]

65. School Board Policy 3210.01, Code of Ethics, states, in relevant part:

> **Fundamental Principles**
>
> The fundamental principles upon which the Code of Ethics is predicated are as follows:
>
> * * *
>
> E. Integrity – Standing up for their beliefs about what is right and what is wrong and resisting social pressure to do wrong.

F. Kindness – Being sympathetic, helpful, compassionate, benevolent, agreeable, and gentle toward people and other living things.

* * *

H. Respect – Showing regard for the worth and dignity of someone or something, being courteous and polite, and judging all people on their merits. It takes three (3) major forms: respect for oneself, respect for other people, and respect for all forms of life and the environment.

* * *

**Conduct Toward Students**

Each employee:

A. [S]hall make reasonable effort to protect the student from conditions harmful to learning and/or the student's mental and/or physical health and/or safety;

* * *

E. [S]hall not intentionally expose a student to unnecessary embarrassment or disparagement;

F. [S]hall not intentionally violate or deny a student's legal rights[.]

66. Based on the foregoing, it is concluded that Respondent's conduct violated rules 6A-10.081(1)(a)1. and (1)(c), and (2)(a)1. and 5.; School Board Policy 3210; and School Board Policy 3210.01, and, thus, constituted misconduct in office under rule 6A-5.056(2).

67. Accordingly, it is concluded that just cause exists, pursuant to section 1012.33, to suspend Respondent from his employment.

68. The Progressive Discipline Policy set forth Article XXI of the UTD Contract, Employee Rights and Due Process, section 1, Due Process, paragraph A.1., states, in pertinent part:

> The [Miami-Dade County School] Board and Union recognize the principle of progressive discipline. The parties agree that disciplinary action may be consistent with the concept of progressive discipline when the Board deems it appropriate, *and that the degree of discipline shall be reasonably related to the seriousness of the offense*.

Progressive Discipline Policy (emphasis added).

69. As discussed above, Petitioner did not present any evidence in this de novo proceeding substantiating its departure from the concept of progressive discipline. As noted above, neither the Progressive Discipline Policy nor Petitioner's adopted policies articulate a disciplinary scale or penalty categories applicable to specific types of conduct. While the Progressive Discipline Policy affords Petitioner the discretion to adhere to it when Petitioner deems progressive discipline "appropriate," it *also* requires that the degree of discipline be *reasonably related to the seriousness of the offense*.

70. The record evidence substantiates the seriousness of Respondent's conduct in pushing S.D., such that imposing a five-day suspension is reasonable discipline for that offense.

71. However, the record evidence does not support departing from the Progressive Discipline Policy for Respondent's use of profanity while speaking with two of his adult colleagues. The evidence does not establish that such conduct is sufficiently serious to warrant a suspension—much less a five-day suspension.[11] Given that Respondent has not previously been subject to discipline by Petitioner, suspending Respondent for this conduct is not reasonably related to the seriousness of the offense; rather, a verbal reprimand is a reasonable penalty under the circumstances.

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[11] An agency's exercise of its discretion must be established by evidence appropriate to the nature of the issues involved, and the agency must expose and elucidate its reasons for its discretionary action. *FPL Co. v. Siting Board*, 693 So. 2d 1025, 1027-28 (Fla. 1st DCA 1997). *See* § 120.57(1)(l), Fla. Stat. (agency imposition of penalty must be supported by the record evidence).

72. For the reasons addressed above, it is concluded that Respondent's conduct in pushing S.D. was sufficiently serious to warrant departing from the Progressive Discipline Policy and suspending him for five days without pay.

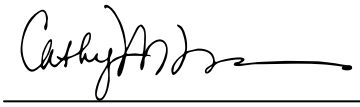
73. For the reasons addressed above, it is concluded that Respondent's conduct in using profanity in speaking to two adult colleagues is not sufficiently serious to warrant departing from the Progressive Discipline Policy. Because Respondent has not previously been subject to discipline, it is concluded that he should be given a verbal reprimand for this conduct.

74. Because the administrative complaint did not charge Respondent with having used profanity toward any students or that any students saw or heard him use profanity, and, in any event, the record evidence did not establish that Respondent directed profanity toward any students or that any students saw or heard him use profanity, Respondent is not subject to discipline for such conduct.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that, consistent with the foregoing, Petitioner enter a final order suspending Respondent from his employment as a teacher for five days without pay, issuing a verbal reprimand to Respondent, and awarding Respondent back pay for five days.

DONE AND ENTERED this 1st day of June, 2020, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of June, 2020.

COPIES FURNISHED:

Christopher J. La Piano, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132
(eServed)

Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 110
Clearwater, Florida 33761-1526
(eServed)

Cristina Rivera, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132
(eServed)

Carlos M. Sanjurjo
Apartment 214
14907 Southwest 80th Street
Miami, Florida 33193

Alberto M. Carvalho, Superintendent
Miami-Dade County Public Schools
1450 Northeast Second Avenue, Suite 912
Miami, Florida 33132

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Richard Corcoran, Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

## 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.