Before the Education Practices Commission of the State of Florida

RICHARD CORCORAN,
Commissioner of Education,

Petitioner,

vs.

DOROTHY J. MEISTER,

Respondent.
_____/

EPC CASE No. 21-0002-RT
Index No. 21-060-FOF
DOAH CASE No. 19-6755PL
PPS No. 178-2106
CERTIFICATE No.633378

Final Order

This matter was heard by a Teacher Panel of the Education Practices Commission pursuant to sections 1012.795, 1012.796 and 120.57(1), Florida Statutes, on January 29, 2021, in Tallahassee, Florida, via video conference call, for consideration of the Recommended Order entered on December 29, 2020, in this case by ELIZABETH W. MCARTHUR, Administrative Law Judge. Respondent was present and represented by Heidi S. Parker, Esquire and Nicholas R. Wolfmeyer, Esquire. Petitioner was represented by Bonnie Wilmot, Esquire and Ron Weaver, Esquire. Attached hereto as Exhibit A is a copy of the Recommended Order. Attached as composite Exhibit B are Respondent's Exceptions to Recommended Order and

Filed February 12, 2021 4:06 PM Division of Administrative Hearings

Petitioner's Response to Respondent's Exceptions to Recommended Order.

Ruling on Exceptions

1. For the reasons stated in the Petitioner's Response to Respondent's Exceptions, the Respondent's exception number 1 is rejected.

2. For the reasons stated in the Petitioner's Response to Respondent's Exceptions, the Respondent's exception number 2 is rejected.

3. For the reasons stated in the Petitioner's Response to Respondent's Exceptions, the Respondent's exception number 3 is rejected.

4. For the reasons stated in the Petitioner's Response to Respondent's Exceptions, the Respondent's exception number 4 is rejected.

Findings of Fact

5. The Panel hereby adopts the findings of fact in the Recommended Order. There is competent substantial evidence to support these findings of fact.

Conclusions of Law

6. The Education Practices Commission has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 1012, Florida Statutes.

7. The Panel hereby adopts the conclusions of law in the Recommended Order.

Recommended Penalty

8. The Education Practices Commission hereby adopts the penalty in the Recommended Order with one exception. Based upon review of the complete record, and paragraph 64 of the Recommended Order in particular, the Education Practices Commission substitutes a college level course in the area of Classroom Management

for the recommended course of Education Ethics.

Penalty

Upon a complete review of the record in this case, it is therefore **ORDERED** that:

9. Respondent's certificate is hereby suspended for two (2) years from the date of this Final Order.

10. Respondent is assessed an administrative fine of $750.00 to be paid within the first two (2) years of the probation period.

11. Upon employment in any public or private position requiring a Florida educator's certificate, Respondent shall be placed on two (2) employment years of probation with the conditions that during that period, the Respondent shall:

A. Immediately notify the investigative office in the Department of Education upon employment or termination of employment in the state in any public or private position requiring a Florida educator's certificate.

B. Have Respondent's immediate supervisor submit annual performance reports to the investigative office in the Department of Education.

C. Pay to the Commission during the first 6 months of each probation year the administrative costs ($150) of monitoring probation assessed to the educator.

D. Violate no law and shall fully comply with all district school board policies, school rules, and State Board of Education rules.

E. Satisfactorily perform all assigned duties in a competent, professional manner.

F. Bear all costs of complying with the terms of a final order entered by the Commission.

G. Provide a certified college transcript to verify successful (a grade of "pass" or a letter grade no lower than a "B") completion of 3 hours of college level course-work in the area of Classroom Management, which may be taken online, during probation.

This Final Order takes effect upon filing with the Clerk of the Education Practices Commission.

DONE AND **ORDERED**, this 5th day of February, 2021.

ANN COPENHAVER, Presiding Officer

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE EDUCATION PRACTICES COMMISSION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Order was furnished to Dorothy J. Meister, at 2500 Miscindy Place, Orlando, Florida 32806 and Heidi S. Parker, Esquire and Nicholas R. Wolfmeyer, Esquire 231 East Colonial Drive, 2nd Floor, Orlando, FL 32801 by Certified U.S. Mail, by electronic mail to Bonnie Wilmot, Deputy General Counsel, Suite 1544, Turlington Building, 325 West Gaines Street, Tallahassee, Florida

32399-0400 and Ron Weaver, Esquire, P.O. Box 770088, Ocala, FL 34477 this 5th day of February, 2021.

Faith Lenzo, Clerk
Education Practices Commission

COPIES FURNISHED TO:

Office of Professional Practices Services

Bureau of Educator Certification

Superintendent
Orange County Schools
P.O. Box 271
Orlando, FL 32802-0271

Director of Personnel
Orange County Schools
P.O. Box 271
Orlando, FL 32802-0271

Timothy Frizzell
Assistant Attorney General

Elizabeth W. McArthur
Administrative Law Judge
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

Claudia Llado, Clerk
Division of Administrative Hearings

Probation Office

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD CORCORAN, AS COMMISSIONER OF EDUCATION,

Petitioner,

Case No. 19-6755PL

vs.

DOROTHY J. MEISTER,

Respondent.
_____/

RECOMMENDED ORDER

Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings (DOAH) conducted a disputed-fact evidentiary hearing by Zoom conference on August 31 and September 1, 2020.

APPEARANCES

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

For Respondent: Heidi S. Parker, Esquire
Egan, Lev, Lindstrom & Siwica, P.A.
231 East Colonial Drive, 2nd Floor
Orlando, Florida 32801

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent failed to make reasonable effort to protect a student from conditions harmful to learning, or to the student's mental or physical health or safety, in violation of section 1012.795(1)(j), Florida Statutes (2017), and Florida Administrative Code Rule 6A-10.081(2)(a)1.; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On August 14, 2019, Richard Corcoran, as Commissioner of Education (Petitioner), issued an Administrative Complaint against Respondent, Dorothy J. Meister (Respondent or Ms. Meister), setting forth allegations regarding an incident in the bathroom in Respondent's classroom on or about September 28, 2017, and charging Respondent with a violation of section 1012.795(1)(j) and rule 6A-10.081(2)(a)1.

Respondent timely filed an Election of Rights by which she requested a disputed-fact administrative hearing, and on December 20, 2019, the case was referred to DOAH for the assignment of an administrative law judge to conduct the requested hearing.

After scheduling input from the parties, the hearing was initially set for February 28, 2020. Thereafter, two continuances were granted, first on Respondent's motion and then on Petitioner's motion. Following the second continuance, the hearing was rescheduled for August 31 and September 1, 2020, by Zoom conference, and it went forward as rescheduled.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation in which they stipulated to a few facts. The stipulated facts are incorporated in the Findings of Fact below.

On August 17, 2020, the same day the Joint Pre-hearing Stipulation was filed, Petitioner filed a Daubert Challenge and Motion to Exclude Testimony as an Expert Witness (Daubert Motion). Respondent filed a response in opposition to the Daubert Motion on August 21, 2020. On August 24, 2020, Petitioner filed a Request for Case Management Conference and Oral Argument on Daubert Motion and Response. For reasons summarized in an Order issued on August 25, 2020, Petitioner's motions were denied.

At the hearing, Petitioner presented the testimony of Christian Gonzalez, Anne Lynaugh, student [redacted], Sandra McGraw, Michelle Carralero,[1] Irene Roth, and Jason Loomis. Petitioner also presented the testimony of student [redacted] and Patricia Lewis by deposition in lieu of live testimony, without objection by Respondent. Petitioner's Exhibits 2 through 18, 19 (limited to Bates pages 65 and 66), and 21 through 25 were admitted in evidence; Petitioner's Exhibits 23 and 24 are the deposition transcripts of [redacted] and Ms. Lewis.[2] Respondent objected to Petitioner's Exhibits 6, 8, 9, 10, 12, and 18 as hearsay. The asserted hearsay nature of these exhibits was noted, but the objections were overruled. The parties were reminded that pursuant to section 120.57(1)(c), Florida Statutes, and Florida Administrative Code Rule 28-106.213(3), if hearsay evidence would not be admissible over objection in a civil action in Florida, it cannot be the sole basis for a finding of fact; its use in this proceeding is limited to supplementing or explaining competent evidence.

Respondent testified on her own behalf and also presented the testimony of Nadja Schreiber Compo, Ph.D. (accepted over objection as an expert in child interview techniques), Christine Lyon, Kate Schneider Panico, and Celeste Haas. Respondent's Exhibits 1, 6,[3] 11, and 12 were admitted.

---

[1] Michelle Carralero is the name used by this witness at work. When testifying, she gave her full/married name, Michelle Carralero Guillen. Since she is referred to in documentary evidence by her work name, she will be referred to that way herein for clarity.

[2] In addition to the deposition transcripts (Pet. Ex. 23 and 24), a flash drive was provided with video recordings of both depositions, which was helpful to resolve a few discrepancies in the court reporter's transcription when converting student names to initials. The flash drive will be secured in a sealed envelope, along with unredacted copies of Petitioner's admitted exhibits, to protect the privacy of students identified therein. Redacted exhibits referring to students by their initials are included in the unsealed part of the record.

[3] Respondent's Exhibit 6 contains student names. An unredacted version is secured in the sealed envelope with Petitioner's unredacted exhibits. A redacted version referring to students by their initials is included in the unsealed part of the record.

After the hearing, the parties were informed of the ten-day timeframe provided by rule for filing proposed recommended orders (PROs), running from the date of filing of the hearing transcript at DOAH.

The four-volume Transcript was filed on October 12, 2020. After the Transcript was filed, two agreed motions for extensions of the PRO deadline were filed and granted.[4] Both parties timely filed PROs by the extended deadline of November 5, 2020, and they have been considered in the preparation of this Recommended Order.

Unless otherwise specified, citations to Florida Statutes and rules are to the 2017 codifications in effect at the time of the allegations. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441 (Fla. 5th DCA 2013).

FINDINGS OF FACT

1. Petitioner is the agency head of the Florida Department of Education. Petitioner is responsible for investigating allegations of misconduct against individuals holding Florida educator certificates. Upon a finding of probable cause, Petitioner is responsible for filing an administrative complaint, and prosecuting the case in a chapter 120 administrative hearing if the educator disputes the allegations.

2. Respondent holds Florida Educator's Certificate 633378, covering the areas of Early Childhood Education, Elementary Education, and English for Speakers of Other Languages (ESOL), which is valid through June 30, 2024.

3. At the time of the allegations in the Administrative Complaint (in the fall of 2017), Respondent was employed as a first-grade teacher at Millennia Gardens Elementary School (Millennia Gardens) in the Orange County

[4] By agreeing to an extended deadline for post-hearing submissions beyond ten days after the filing of the transcript, the parties waived the 30-day timeframe for issuance of the Recommended Order. *See* Fla. Admin. Code R. 28-106.216.

School District (School District). Respondent had just begun teaching first grade at Millennia Gardens that school year (2017-2018).

4. Respondent has been employed by Orange County Public Schools (OCPS) since November 7, 1988. Before the 2017-2018 school year, she was a classroom teacher for only four years early in her career, teaching kindergarten at Pines Hills Elementary School from 1990 to 1994.

5. For the next nine years, Respondent taught ESOL "pull-out" sessions for small groups of students who were learning English. The students would be taken out of their regular classrooms to work with Respondent for about 45 minutes per day, and then they would return to their regular classrooms.

6. In 2003, Respondent became the curriculum compliance teacher for the ESOL program. She explained that this primarily involved paperwork, parent meetings, and student testing. Her job was classified as a non-classroom position. She did some work with small groups of students, usually on an informal basis. Instead of all-day responsibility for a full classroom, she would work with four or five students for thirty-minute sessions.

7. Prior to the 2017-2018 school year, Respondent had been working at Grand Avenue Primary Learning Center in the ESOL curriculum compliance position for ten years. Respondent offered in evidence the annual performance evaluations for her last five years in this non-classroom position, showing she achieved overall ratings of effective or highly effective.[5]

8. Grand Avenue Primary Learning Center closed after the 2016-2017 school year. The School District placed Respondent at Millennia Gardens, where she was assigned to a first-grade classroom teaching position because there was an opening. Respondent did not request the assignment, nor did

[5] Respondent did not offer her performance evaluations as a classroom teacher in evidence, from either the four-year period in the early 1990s or any period since her return to the classroom in August 2017. Respondent described her evaluation for 2018-2019, testifying that her overall evaluation was "needs improvement," with an "unsatisfactory" rating for student learning gains. She said no annual evaluations were done for the 2019-2020 school year due to the COVID-19 pandemic and the change to remote online classes. There is no record evidence as to Respondent's evaluation for the 2017-2018 school year at issue here.

Millennia Gardens select Respondent following an interview process to fill the opening, but the placement was made and Respondent took the position.

9. Respondent's re-entry into classroom teaching after a 23-year hiatus was challenging, primarily because of new technologies incorporated into teaching. Millennia Gardens was a new school, having opened in 2016, and it was fully digital in 2017. Her classroom had a Smart Board she was supposed to use to teach, and the students had individual devices (tablets or laptops). Respondent admitted she was slow to adapt to technology. The students were accustomed to digital experiences in the classroom, but Respondent often resorted to "old school" methods. The students became antsy and impatient with her fumbling and shying away from technology she was supposed to use.

10. Some aspects of classroom teaching, however, were not new. First graders, Respondent knew, could present management challenges. As she put it, first graders all have their moments. While her students were on their best behavior for the first couple of weeks of the school year—what she called the "honeymoon" period—that ended by [redacted], when Respondent began having to call for assistance from the "School Wide Assistance Team," referred to as the SWAT team. Her calls, logged by the front office, were sporadic at first, then more frequent beginning in late [redacted].

11. Respondent's first-grade classroom was relatively small in terms of physical space and number of students (17 or 18 students in the fall of [redacted]).

12. Among Respondent's 17 or 18 students were [redacted], [redacted], [redacted], and [redacted][6] Respondent described [redacted] and [redacted] as troublemakers—the two students most consistently engaging in disruptive behavior, and the ones for whom she would resort to calls for SWAT assistance. As for the other two, Respondent described [redacted] as "a bright kid" who did not initiate trouble but would sometimes join in the disruption started by [redacted] and [redacted]; and Respondent described [redacted] as a happy child most of the time, though on occasion,

[6] These four students were all in Respondent's classroom until [redacted], when [redacted] was transferred to another first-grade class at Millennia Gardens taught by Ms. Rivera.

something would set [redacted] off and [redacted] would talk back or refuse to follow instructions. [redacted] was described by a Millenia Gardens assistant principal and the master principal[7] as a very smart, articulate little [redacted].

13. Inside Respondent's classroom was a bathroom designed for one occupant, with a single toilet and sink. Respondent's rule to control bathroom traffic was to require a student to raise his or her hand and receive Respondent's permission to go to the bathroom.

14. Respondent knew that, in defiance of her rule, sometimes more than one student would go into the bathroom at the same time. Respondent acknowledged that there were multiple occasions when [redacted] and [redacted] would run into the bathroom together to hide when they were in trouble. (These occasions would have been before [redacted], when [redacted] was transferred to another class.) Another time, two girls went into the bathroom together to share chewing gum. When Respondent noticed multiple students going into the bathroom together, she would order them out, unlocking the door if necessary.

15. Although Respondent knew that sometimes multiple students went into the bathroom together—a risky, potentially dangerous situation given the lack of any supervision—Respondent did not employ special procedures or increase her vigilance to ensure she would be aware of, and thwart, attempts by multiple students to disappear into the bathroom. In Respondent's small classroom, heightened vigilance would have meant keeping eyes on, and knowing the whereabouts of, all students—particularly the troublemakers.

16. Respondent's classroom was set up so that from anywhere in the classroom, she would have been able to account for the whereabouts of her students. The student desks were grouped in five clusters. Four clusters had four desks pushed together, with two desks side-by-side facing two more

[7] As "master principal," Ms. Lynaugh was principal of two schools in the [redacted] school year: Millenia Elementary School and Millenia Gardens. She was aided by two assistant principals at Millenia Gardens: Michelle Carralero and Sandra McGraw.

desks side-by-side. The fifth cluster had three desks, with two desks pushed together facing each other and the front of a third desk pushed up to the side of the two desks. Respondent's desk was in the far corner of the classroom, diagonally across the room from the classroom door. Her desk faced out to the classroom, although she testified that she rarely sat at her desk, which was covered with papers in wild disarray, some half falling off the desk's surface.

17. On [redacted], Respondent gave her students an assignment to write about something they had done the previous day. While circulating, Respondent noticed [redacted]'s paper. On one side, [redacted] wrote: "Last night I had fun. First, Next. Movie." However, on the other side of the paper, a picture was drawn of a shape—possibly a face—with two hearts, the word "Love" next to the hearts, and immediately below, the words, "I like to have sex."

18. Respondent asked [redacted] why [redacted] wrote that, referring to the note about "sex." [redacted] responded that [redacted] did not write it. However, Respondent saw that the words appeared to be in [redacted]'s handwriting, comparable to [redacted]'s writing on the same paper responding to the assignment.

19. Respondent took the paper away from [redacted] and wrote [redacted]'s name and the date on it. However, she did not immediately report it or show the paper to an administrator, to the school counselor, or to [redacted]'s parents that day, [redacted] (a Wednesday), nor on Thursday, [redacted], or Friday, [redacted]. It was not until after the school day on Friday that Respondent decided to leave a note for the school counselor, along with [redacted]'s paper, in the counselor's mailbox. Her note said: "Mr. Gonzalez, I wanted you to see what [redacted] wrote on the attached paper. Could you please speak with [redacted] sometime? Thank you! Jane Meister." Respondent explained:

> I had intended to discuss it with our guidance counselor in person, but I was, you know, we had a lot of meetings that week and I was having issues with my leg that I was not able to arrange to catch him within a reasonable period of time. So then I wrote a note asking him to discuss this with [redacted] and put it in his mailbox. (Tr. 466-67).

20. Respondent admitted she knew the counselor may well have already left for the weekend, which turned out to be the case. It was not until late morning on Monday, [redacted], that the counselor, Mr. Gonzalez, checked his mailbox and found [redacted]'s paper with Respondent's note.

21. Although Respondent had not acted with any sense of urgency, Mr. Gonzalez did. He described [redacted]'s note about sex as a red flag. As he and other witnesses explained, it is not normal for a first grader to use the word "sex," so [redacted]'s "sex" note raised concerns about what was going on in the student's school life, family life, or community life.[8]

22. Mr. Gonzalez immediately notified assistant principal Sandra McGraw about the two notes ([redacted]'s "sex" note and Respondent's note asking him to speak with [redacted] "sometime"). Ms. McGraw asked Mr. Gonzalez to follow protocol and speak confidentially to [redacted] about it.

23. That afternoon, Mr. Gonzalez took [redacted] out of Ms. Meister's classroom and escorted [redacted] to his office to speak to [redacted] privately. Once in the office, he asked [redacted] about the note, showing it to [redacted]. [redacted] said that [redacted] did not write the note, but [redacted] also said that there were three [redacted] involved in getting [redacted] to write the note and helping [redacted] with the spelling. She identified the three [redacted] as [redacted], [redacted], and [redacted]

24. Mr. Gonzalez testified that [redacted] seemed distressed and was not very forthcoming, so he did not prolong the interview. He returned [redacted] to the classroom after five minutes.

25. Mr. Gonzalez then spoke separately with each of the three [redacted] about [redacted]'s note. Each of them denied pressuring [redacted] to write the note about "sex."

[8] Respondent asserted otherwise in her PRO. Respondent offered this statement to suggest that [redacted]'s "sex" note may not have been cause for concern: "Children of 6 and 7-year-olds [sic] begin to be curious about sex at this age." (Resp. PRO at 33). More boldly, Respondent asserted: "Children of 6 and 7-years old engage in exploratory sexual play. This is normal." (Resp. PRO at 35). These statements were not supported by citations to record evidence; there is no record support. All the credible record evidence was to the contrary.

26. Mr. Gonzalez also spoke briefly to Respondent that afternoon, reminding her that she was required to report the "sex" note to the Department of Children and Families' (DCF) abuse hotline. She responded, "I know." She had not yet reported the "sex" note to DCF; she testified she did not call the abuse hotline to report the "sex" note until told to do so.[9]

27. Mr. Gonzalez updated Ms. McGraw and suggested that she might want to try to follow up with [redacted]. He testified that both Ms. McGraw and Ms. Carralero spoke with these children a lot—he called them "go-to" persons for the young students—and he thought [redacted] might be more comfortable speaking to a female about the "sex" note.

28. Ms. McGraw followed up with [redacted], as suggested. On [redacted], she took [redacted] out of Respondent's class and brought [redacted] to her office to talk. Ms. McGraw testified credibly that she already had an established rapport with [redacted] and that [redacted], like other students, tended to open up to and talk easily with Ms. McGraw. To encourage this, Ms. McGraw had a comfortable set-up in her office, including a beanbag for children to sit on.

29. Ms. McGraw's purpose in talking to [redacted] was to follow up about the "sex" note. She let [redacted] get comfortable on the beanbag, then asked [redacted] to tell her about it.

30. To Ms. McGraw's surprise, [redacted] opened up and volunteered information about a different subject: an incident in the bathroom in Respondent's classroom. [redacted] told Ms. McGraw that [redacted] did not know how it happened, [redacted] thought [redacted] had locked the door, but three [redacted]—[redacted], [redacted], and [redacted]—followed [redacted] into the classroom bathroom. [redacted] told Ms. McGraw

[9] Respondent claimed that when she called the DCF abuse hotline to report the "sex" note, someone told her the report did not meet DCF's criteria. Her testimony regarding what she was told is hearsay that would not be admissible over objection in a civil action and that neither supplements nor explains any admissible evidence. It is insufficient to support a finding of fact and no finding is made on this subject.

that one [redacted] stood guard at the door, while the other two got [redacted] down to the floor and held [redacted] down, doing inappropriate things to [redacted].[10]

31. Ms. McGraw testified credibly that when [redacted] told her about the bathroom incident, the first thing Ms. McGraw asked [redacted] was where Ms. Meister was when [redacted] went into the bathroom. [redacted] responded that Ms. Meister was in the classroom.

32. Ms. McGraw had [redacted] write down what [redacted] was able to, but all [redacted] wrote was the names of the three [redacted]. Ms. McGraw did not belabor the matter, as she wanted to speak with the three [redacted] before the end of the day (November 7), contact the students' parents, and report the incident to OCPS officials, to DCF, and to the Orange County Police Department.

33. Ms. McGraw had the three [redacted] taken out of class and put in separate rooms. She spoke with each boy separately. Each [redacted] admitted to a bathroom incident of some kind, and two of the [redacted] admitted that [redacted] was touched inappropriately. [redacted] admitted that he and [redacted] followed [redacted] into the bathroom, [redacted] touched [redacted] on [redacted] "private part," and [redacted] tried to stop [redacted]. [redacted] admitted to touching [redacted]'s belly, and [redacted] pushed [redacted] back. [redacted] said that [redacted] and [redacted] went into the bathroom while [redacted] was using it, and they tried to kiss [redacted] and jump on [redacted]. [redacted] only said something about playing in the bathroom. Each boy wrote a short statement, signed by Ms. McGraw.

34. [redacted] had difficulty writing what [redacted] had said—[redacted] was not very good at writing yet—so Ms. McGraw arranged for Mr. Gonzalez to assist by writing down what [redacted] said. When assisted statements are taken, the practice is to bring in a witness to ensure that what the recorder writes down accurately reflects what the witness said. Ms. McGraw started off as a witness to this

[10] Ms. McGraw's testimony regarding what [redacted] told her supplements and explains the credible testimony of both [redacted] (by deposition admitted in lieu of hearing testimony) and [redacted] (who testified at the hearing). It also refutes Respondent's position, raised before the hearing as the rationale for allowing expert testimony, that improper and suggestive interview techniques used in investigating the bathroom incident shaped the children's statements about the incident. *See* Response to Petitioner's Daubert Motion (filed Aug. 21, 2020).

assisted-statement process, but was called away (because the students' parents whom she had called had arrived to speak with her) and the other assistant principal, Michelle Carralero, took her place as the witness. Mr. Gonzalez wrote down [redacted]'s exact words except in one or two instances where he paraphrased what [redacted] said without changing the meaning.

35. Ms. McGraw testified that, like with [redacted], her first question to [redacted] and to [redacted] after they each described a bathroom incident like what [redacted] had described was where Ms. Meister was when the bathroom incident occurred. They each reported that Ms. Meister was in the classroom.[11]

36. Before the end of the school day, Ms. McGraw also spoke briefly with Respondent to let her know they were now looking into a bathroom incident involving [redacted]., [redacted]., [redacted], and [redacted] Respondent declined to talk about the incident, but commented that it would not be the first time that multiple students had been in the bathroom together.

37. Ms. McGraw's testimony regarding what she was told by [redacted] and the three [redacted] on [redacted], was generally consistent with her sworn statement provided to the Orlando Police Department later that same day.[12]

---

[11] Ms. McGraw's testimony regarding what the three [redacted] said to her about the bathroom incident on November 7 and the written statements produced and/or signed by the [redacted] that day supplement and explain admissible evidence in the form of [redacted]'s and [redacted]'s testimony.

[12] Respondent's PRO inaccurately stated that Ms. McGraw's written police statement "did not contain [redacted].'s statements to her" and instead, Ms. McGraw wrote about what was said to others in interviews. (Resp. PRO at 11, ¶ 49). To the contrary, Ms. McGraw's statement reported what [redacted] told her about the bathroom incident: "On Thursday, November 7th, as a follow-up, I pulled [redacted] from [redacted] classroom to ask[ ] [redacted] more about the ["sex"] note. Then, [redacted] preceded [sic] to tell me about what happened to [redacted] in the restroom. … According to [redacted], there were three [redacted] who entered the restroom. One [redacted], [redacted], was in there blocking the door and the other two [redacted], [redacted] and [redacted], took turns holding [redacted] down and getting on top of [redacted]." (Pet. Ex. 19, Bates p. 66; children's names replaced with initials). Ms. McGraw did not include in her written police statement the fact that [redacted] (as well as the [redacted] told her Respondent was in the classroom at the time of the bathroom incident, but Ms. McGraw testified that she told the police this, and also told them that Ms. Meister had said this would not be the first time multiple students went in the bathroom together. (Tr. 173-74). Omitting those details in her written police statement is not surprising, since the police were investigating "allegations of sexual misconduct by juvenile offenders with a juvenile victim." Amended Stipulated Motion for Protective Order, ¶ 2, filed March 16, 2020. Details relevant here to whether Respondent met her supervisory responsibilities in the classroom would not be important in a police investigation of what the [redacted] did to [redacted]. in the bathroom.

38. One open question following [redacted]'s revelation of the bathroom incident was when the incident took place. Ms. McGraw testified that she filled in the "date of the incident" space on [redacted]'s written statement, writing that the incident was "last week." The boys' written statements are similar. At the hearing, Ms. McGraw testified that she was uncertain whether she just assumed the bathroom incident had occurred the prior week because that is when the "sex" note was written, or whether [redacted] or the [redacted] had said the incident was the prior week. Regardless, as Ms. McGraw and other witnesses agreed, first-graders do not have a very good concept of the passage of time so as to accurately report whether past events were last week or last month.

39. Over the next two days (November 8 and 9), two DCF child protective investigators conducted interviews of the children regarding the bathroom incident. Either Ms. Carralero or Mr. Loomis sat in on the interviews and took notes, but let a DCF investigator conduct the interviews. Ms. Carralero was asked to sit in on the interview of [redacted] in Mr. Loomis's place, because she had a preexisting relationship and good rapport with [redacted], having known [redacted] and [redacted] family from having worked with and supervised [redacted] older brother. Notes of interviews of [redacted], [redacted], [redacted], and [redacted], are generally consistent with admissible evidence regarding the bathroom incident, at least in most respects that are material to the issues in this case.

40. Ms. Carralero was tasked with following up to determine a timeframe for the bathroom incident. To accomplish this, she spoke separately with [redacted] and [redacted] on several occasions, finding the two of them to be most forthcoming about the details (perhaps in part because of the good rapport she already had with [redacted]). First, Ms. Carralero attempted to narrow the time of day when the bathroom incident occurred, using broad frames of reference such as before or after "specials" (a slot for rotating special classes in art, music, and physical education), and before or after lunch. The students separately identified the time after specials and before lunch. That time slot, according to the first-grade classroom schedule, was for math.

41. As a cross-check, Ms. Carralero then asked each student separately what they were working on, and they both responded that they were working on math. She then took it the next step, asking each student separately if they could recall what type of math they were working on. They each responded separately that they were learning counting by tens.

42. Ms. Carralero then separately handed each student their math workbook and asked if they could identify what they were working on in their workbook. The students each identified a workbook page. Although they were not identical pages, they were in the range of pages worked on one day apart, according to Ms. Meister's lesson plan that she was required to draw up each week and follow. [redacted] identified page 250 of the workbook, which was on the lesson plan schedule for individual work on Thursday, [redacted]. [redacted] identified page 246 of the workbook, which was on the lesson plan schedule for individual work on Wednesday, [redacted].

43. As a final step to narrow down the timeframe, Ms. Carralero asked [redacted] if [redacted] recalled what [redacted] was wearing the day of the bathroom incident. [redacted] responded that [redacted] was wearing [redacted], and that [redacted] hair was braided. Ms. Carralero asked [redacted]. separately if [redacted] remembered what [redacted] was wearing that day, and he also said something [redacted]. Ms. Carralero then studied security video recordings for the week pinpointed by the students' identification of what they were working on in their math workbooks. Ms. Carralero found a match on [redacted]: that day, [redacted]'s clothing and hair fit the description given by [redacted] and [redacted] Ms. Carralero then verified from school records that the four students and Ms. Meister were all present in class that day.

44. Ms. Carralero's approach was reasonable, and her testimony regarding how she made her determination was clear, credible, and consistent with the evidence of Respondent's class schedule and lesson plans. While it cannot be said with 100 percent certainty that the bathroom incident occurred on [redacted], that date is supported by clear and convincing evidence.

45. In addition to the indicators determined by Ms. Carralero's studied approach, each indicator confirming and reinforcing the others, a few independent factors tend to add credence to her timeline determination.

46. One fact establishes that the bathroom incident must have occurred before [redacted]: [redacted]. was removed from Ms. Carralero's class and transferred to Ms. Rivera's class on [redacted].

47. In addition, a review of the SWAT logs shows that, while Ms. Meister's calls for assistance began on September 1, they were sporadic until late in September.[13] September 28, in particular, stands out as the first banner problem day, with three separate calls for assistance with [redacted] The first call, just after the school day began, was because [redacted] had locked [redacted] in the classroom bathroom and assistance was needed to coax [redacted] out. As Respondent put it, on some days, [redacted] just showed up in an unhappy state, and it seemed to get worse throughout the day. But this day-long trend was not evident until [redacted].

48. A predetermination meeting was held on [redacted]. Respondent and her union representative were provided the investigative file material, including the student statements and notes of interviews, and Respondent was given an opportunity at the meeting to respond. Respondent repeated what she had told Ms. McGraw on November 7—that there were a number of occasions when multiple students had gone into the bathroom together before. When asked how she could have failed to notice nearly one-fourth of her class disappearing into the bathroom at the same time, she said that she may not have noticed because she was circulating around the

---

[13] The log of SWAT calls shows the following calls by Ms. Meister for assistance: once on September 1 for [redacted].; once on September 7 for [redacted].; on September 20, once at 9:02 a.m. for [redacted] and once at 9:40 a.m. for "[redacted]." (an apparent mistaken reference to [redacted]); once on September 22 for [redacted]; on September 25, once at an unknown time for [redacted], and again at 1:05 p.m. for [redacted]; once on September 26 for both [redacted] and [redacted]; and three times on September 28 for [redacted], at 8:53 a.m., 9:50 a.m., and 12:50 p.m. Respondent points out in her PRO that there were 31 total SWAT calls for P.C. through the end of October, but only five of those calls were before [redacted].

classroom. She acknowledged that as of [redacted], the bathroom door made a loud noise when closed, but she said that she would not necessarily have heard the loud bathroom door close on [redacted], if her class was being noisy at the time.

49. Following that meeting, the School District's investigation was summarized in a report prepared by Mr. Loomis. Respondent was disciplined in the form of a written reprimand for misconduct, by failing to properly supervise her class. She also received a non-disciplinary directive reminding her that she was required to adequately supervise her students.

50. Respondent points out inconsistencies in the details regarding the bathroom incident, as set forth in the reports, statements, notes from interviews, and hearing testimony, which Respondent contends undermines the reliability of all the evidence. Respondent's point might be well-taken if this were a proceeding to determine whether one of the three [redacted] had committed specific acts against [redacted] during the bathroom incident, because the inconsistencies are in the details of who did exactly what to [redacted] However, that is not the issue for determination in this case.

51. Respondent offered testimony from an expert in child interview techniques, to point out that "best practices" for interviewing children were either not followed in the investigations of the bathroom incident or it cannot be discerned whether they were followed. The "best practices" guidelines offered in evidence provide a template for law enforcement officers to follow in interviewing alleged child victims of sex abuse. Examples of "best practices" to follow were: developing rapport with a child before delving into the sex abuse topic; interviewing the child in a comfortable, child-friendly place; not asking leading questions; limiting the number of adults in the interview room to one, ideally; limiting the times a child is interviewed; video recording interviews of child witnesses; and keeping a written record of the questions asked to ensure they were not leading.

52. Since the interviews of children in this case were not recorded and Respondent's expert could not determine whether other best practices were followed, she offered the opinion that the children's statements could have been tainted by the process. She opined that the children's statements may have been born not of true memories of what happened, but rather, memories of what they may have been led to say or write, reinforced in repeated interviews that did not follow best practices or may not have followed best practices. In the context of this case, the expert opinions were not persuasive.

53. While the concepts of the "best practices" guidelines in evidence may have some application beyond the context of a police officer interviewing an alleged child victim of sex abuse, there are some obvious differences with interviews conducted by school personnel investigating classroom matters. The initial interviews were conducted by the assistant principals and school counselor with whom the children frequently talked—they were the "go-to" persons—who already had good rapports established with these children, and who were all well-trained and experienced in conducting interviews of children to carry out investigations in school matters. That is very different from the first encounter of a police officer with an alleged child victim of sex abuse; rapport-building would be necessary before diving into the topic of sex abuse. In addition, Respondent's expert had the impression that the initial interviews were in a conference room with multiple strangers participating. Those were the second interviews controlled by DCF child protective investigators (who, presumably, were also well-trained in interviewing children, since that is their job). Respondent's expert did not have the benefit of Ms. McGraw's testimony regarding the child-friendly beanbag set-up in her office where [redacted] first revealed the bathroom incident.

54. Of note, Respondent's expert acknowledged that an alleged victim's first interview is the strongest evidence, particularly if the child witness volunteers the critical information rather than providing it in response to leading questions. In this case, it was striking that the first reveal of the

bathroom incident came from [redacted] volunteering the information, not in response to any question because no one knew to ask about it. Ms. McGraw's testimony regarding [redacted]'s surprising reveal of the bathroom incident was clear, credible, and compelling to refute Respondent's argument raised before hearing that the way in which the interviews and investigation were carried out may have infected the children's statements.

55. Although the expert testimony offered by Respondent addressed interviewing children generally, the "best practices" guidance document offered in evidence was specific to interviewing alleged child victims of sex abuse. Respondent's expert did not address the fact that in this case, interviews involved more than the alleged victim, [redacted]; they extended to the alleged perpetrators. Here, three [redacted] each admitted, to varying degrees, that they were involved in a bathroom incident in which [redacted] was the unwilling recipient of kisses and touches on [redacted] "private part." The fact that each of the [redacted] tended to point the finger of blame for specific offensive kisses and touches at one of the other [redacted] might be an impediment to finding that one particular [redacted] committed a particular wrongful act, but that is not the issue in this case. Here, that phenomenon adds force to the collective story told by these [redacted] who were admitting, against their self-interest, to participating in a bathroom incident, while trying to minimize their personal culpability.

56. The credible hearing testimony of [redacted] and [redacted], nearly [redacted] after the bathroom incident, painted a clear big picture that three [redacted] ([redacted], [redacted], and [redacted])[14] went into the bathroom in Respondent's classroom with one [redacted], [redacted], and while the four students were in the bathroom together, there were one or more occurrences of unwelcome and inappropriate touching of [redacted]'s "private part." This clear and convincing big picture was supplemented,

[14] In [redacted] deposition, [redacted]. named all three [redacted] by their first names: [redacted] and [redacted] When converting the [redacted] first names to first and last initials for the transcript, the court reporter combined two [redacted] first initials, merging two [redacted] s into one. *See* Pet. Ex. 23 at 8 and 10 (referring several times to two [redacted], [redacted] and [redacted], instead of three [redacted], [redacted]., [redacted]., and [redacted]). The video recording of the deposition shows that all three [redacted]s were named, rather than two.

explained, and corroborated by the statements and interviews of these children. By admitting their involvement, each of the three [redacted] ended up serving a suspension. Respondent's expert failed to offer an explanation as to why [redacted] would admit to their own involvement in the bathroom incident if there had been no such incident.

57. Respondent has maintained that she was not aware of the bathroom incident. She attempted to suggest the possibility that the bathroom incident may have occurred during one of the "few occasions" in all of [redacted] when she left the classroom, a couple of times to go to the office and a couple more times to go to the restroom, leaving a paraprofessional in charge. However, Respondent also admitted that it was entirely possible that the four students could have been in the bathroom together for as long as five minutes while she was in the classroom without her even being aware of their absence. When asked how that could have happened, she testified as follows:

> Probably, you know, when the students were doing work in their seats, I would circulate and help the students as it was needed. So if it was -- if I was helping a student on the far side of the room I would have had my back turned to the restroom. And, you know, if I was focused on the child I was talking to and their work on the desk in front of me, I would not have seen what was going on behind me.
>
> * * *
>
> Probably not five whole minutes with one student. But it would be entirely possible that I moved from one student to another sitting right next to that student without turning my back or without turning around again. (Tr. 495-97).

58. Respondent's testimony stands as an admission that she was inadequately supervising her class. Having her back to her whole class—including the known troublemakers and the bathroom that they were known to run into and hide—for as long as five minutes is unreasonable and unacceptable. It is incomprehensible that while helping one student, she

would not position herself to see the rest of the class in her peripheral vision, or regularly swivel her neck to make eye contact with the other students—particularly the known troublemakers. Rather than making this reasonable effort to protect her students from harm, she created conditions that were harmful to the physical and mental health and safety of one student.

59. The credible testimony of both [redacted] and [redacted] established that Respondent was in the classroom at the time of the bathroom incident. [redacted] testified that Respondent was the one who gave [redacted] permission to go to the bathroom when [redacted] raised [redacted] hand. [redacted] also testified that Respondent was in the classroom when [redacted], [redacted], and [redacted] went into the bathroom. And both [redacted] and [redacted] testified that Respondent was in the classroom when they came out of the bathroom. [redacted] added that Respondent was on the school phone when [redacted] left the bathroom. While there were details that neither [redacted] nor [redacted] could recall about the bathroom incident, testifying nearly [redacted] after it occurred, their testimony was clear, credible, and consistent regarding Ms. Meister's presence in the classroom at the time of the bathroom incident.[15] Their testimony on this point was corroborated by Ms. McGraw's

[15] Respondent's PRO argued that testimony of [redacted] and [redacted]. should be discounted or ignored as the product of leading questions. No "leading" objections were made during [redacted]'s deposition. As for [redacted]., Respondent's counsel did not object to [redacted]'s testimony that [redacted], [redacted], [redacted], and [redacted] were all in the bathroom in Ms. Meister's classroom. A single "leading" objection was made after the following two questions and answers:

> Q: Okay. Now, before you all went into the restroom, was Ms. Meister in the classroom?
> A: Yes.
> Q: When you all came out of the restroom, was Ms. Meister in the classroom?
> A: Yes.
> Ms. Parker: I'm going to object. Leading the witness. (Tr. 121).

The belated objection was overruled. That a question calls for a yes or no answer does not make it leading; instead, a question is leading if it suggests the answer. *Happ v. State*, 922 So. 2d 182, 185 (Fla. 2005) ("This court has long held that a question is not necessarily leading simply because it calls for a "yes" or "no" answer. Instead, a question is leading when it points out the desired answer."); *Porter v. State*, 386 So. 2d 1209, 1211 (Fla. 3d DCA 1980) (abbreviated definition of a leading question as one calling for a "yes" or "no" answer is misleading; the real test is if a question suggests only the answer yes or only the answer no).

clear testimony that [redacted] and the [redacted] told her Ms. Meister was in the classroom at the time of the bathroom incident when that incident was first revealed on [redacted].

60. Respondent presented evidence of circumstances which she asserted should mitigate against any disciplinary consequences. She argued that Millennia Gardens' administration was to blame by assigning her to a classroom with very difficult students to manage and not giving her more help to learn the new technologies while trying to manage her classroom.

61. Yet Respondent acknowledged the importance of her supervisory responsibilities as a first-grade teacher. She was responsible for the care and safety of the students in her classroom who were under her charge. As the master principal of Millenia Gardens put it: "Supervision is number one. You've got to have your eyes on the children at all times."

62. Respondent identified two students who were involved in the bathroom incident, [redacted] and [redacted], as the ones who were most consistently disruptive in her class. She testified that at some point during the fall of [redacted], she submitted a recommendation that the two [redacted] should be evaluated for possible special education status. This evaluation process, referred to as the "MTSS" (multi-tiered student support) process, cannot happen quickly. If a school determines that a child should be evaluated for possible support, notice must be given to the parents and a meeting must be coordinated with the parents and a multidisciplinary team of school personnel. At such a meeting, a discussion ensues regarding the child's needs, possible interventions, and possible areas for professional evaluation. If and only if it is agreed that professional evaluation should occur, and the parents give their informed written consent, then a 90-day professional evaluation process begins. At the end of a 90-day evaluation process, it is possible that the school's determination would be that no special support is warranted; or it is possible that the school determines that student support in some form is warranted. If the latter determination is made, then the school would draw

up an individual education plan (IEP) for the child, providing for such measures to be taken as are appropriate for the child, based on the evaluation results. In addition to an IEP, one possibility for a child with behavioral problems is the development of a behavioral improvement plan (BIP). No particular measures are employed in all IEPs or BIPs. One possibility is that a child would remain in a regular classroom with an aide assigned to help the child; however, that is only one of many possible measures that may be employed.

63. Respondent was unable to say exactly when during the fall she submitted her recommendation that [redacted] and [redacted] go through the process for possible evaluation for special education. Although the evidence was not clear in this regard, at the time of the bathroom incident, Respondent may have been just about to make that recommendation or possibly may have just made that recommendation. The evidence was clear that at the time of the bathroom incident, the process had not gone forward to the point where parents had been contacted, a meeting set up, or parental consents for professional evaluations obtained. It would be sheer speculation to say what determinations could result following a 90-day evaluation period that had not yet been authorized or begun. Respondent cannot simply abdicate her responsibilities upon identifying two students for whom she recommended that such an evaluation process should start, as if that step created an entitlement to a particular end result.

64. Respondent's claim that these two disruptive students made it impossible for her to manage her classroom is particularly troubling in the context in which it is being raised. Respondent cannot claim that she was oblivious because she was distracted by the two disruptive students. Those two disruptive students were secreted away in the bathroom. This makes it

all the more incomprehensible that Respondent was unaware that nearly one-fourth of her class had disappeared.[16]

CONCLUSIONS OF LAW

65. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2020).

66. In this proceeding, Petitioner seeks to impose discipline against Respondent's educator certification, which is a form of license. *See* § 120.52(10), Fla. Stat. A proceeding to suspend, revoke, or impose other discipline upon a license is penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose such discipline, Petitioner must prove the allegations in the Administrative Complaint by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 933-34 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292, 294-95 (Fla. 1987).

67. As stated by the Supreme Court of Florida:

> 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 at 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.

[16] Respondent posits an alternative theory in her PRO that perhaps Respondent became aware that the students were missing and was calling SWAT for help when the children came out of the bathroom; under this scenario, "Ms. Meister in fact acted reasonably to protect the health and safety of her students." (Resp. PRO at 36). This alternative theory would be consistent with J.C.'s testimony that when she left the bathroom, Ms. Meister was on the school phone. But the theory is inconsistent with evidence regarding the nature of Respondent's SWAT calls and the assistance provided in response to those calls that day. Most importantly, though, it is curious that Respondent suggests a scenario so obviously inconsistent with Respondent's testimony that she was not aware of the bathroom incident. If Respondent wanted to admit she was aware of the bathroom incident, the time to do so was when she testified, so the questions regarding her actions could have been explored.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). This burden of proof may be met where the evidence is in conflict; however, "it seems to preclude evidence that is ambiguous." *Westinghouse Elec. Corp. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

68. Section 1012.796 sets forth 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.

69. Penal statutes and rules authorizing discipline against a professional license must be strictly construed, with any ambiguity resolved in favor of the licensee. *Elmariah v. Dep't of Prof'l Reg., Bd. of Med.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990).

70. In addition, disciplinary action must be predicated on facts alleged and charges set forth in an administrative complaint. *See* § 120.60(5), Fla. Stat.; *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).

71. Count 1 of the Administrative Complaint charges Respondent with a violation of section 1012.795(1)(j), which authorizes discipline for violations of the Principles of Professional Conduct for the Education Profession prescribed by the State Board of Education rules. This count does not charge an independent violation, but rather, is dependent upon a corresponding violation of the rules prescribing the Principles of Professional Conduct.

72. Count 2 of the Administrative Complaint charges Respondent with violating rule 6A-10.081(2)(a)1., providing as follows:

> (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.

73. As reflected in this Principle of Professional Conduct, teachers have a supervisory responsibility for the students in their charge. Teachers "stand *in loco parentis*, 'in the place of a parent,' with respect to students in their classrooms who they must supervise and control. They owe a general duty of supervision to the students placed within their care ... and are responsible to protect children during school activity." *Morris v. State*, 228 So. 3d 670, 672-73 (Fla. 1st DCA 2017) (internal citations and quotes omitted).

74. Based on the Findings of Fact above, Petitioner proved that Respondent violated section 1012.795(1)(j) through a violation of rule 6A-10.081(2)(a)1. Respondent had a professional obligation to make reasonable effort to protect her students from conditions that were harmful to their mental and/or physical health and/or safety. Instead, the credible evidence

clearly and convincingly established that Respondent failed to adequately supervise her first-grade class, creating the conditions that proved to be harmful to [redacted]'s mental and physical health and safety.[17]

75. At the time of the incident, the disciplinary guidelines, codified in Florida Administrative Code Rule 6B-11.007, provided that the normal penalty range for the violation found here was from probation to revocation. *See* Fla. Admin. Code R. 6B-11.007(2)(i)16., effective April 9, 2009.[18]

76. Rule 6B-11.007(3) provided that a penalty outside the normal range was allowed when warranted by consideration of mitigating and aggravating circumstances. The applicable mitigating and aggravating circumstances codified in the rule have been considered. As for mitigating circumstances, Respondent has held a teaching certificate for over thirty years, and the first disciplinary action against her was the issuance of a reprimand in connection with the bathroom incident for misconduct in the form of a failure to properly supervise her students. However, most of Respondent's discipline-free years were not as a classroom teacher responsible for supervising a full class, making this mitigation factor somewhat less weighty. This mitigating circumstance is offset or outweighed by the serious nature of the violation. Respondent not only failed to make reasonable effort to protect against

---

[17] As noted above, evidence characterized by Respondent as hearsay supplemented, explained, and corroborated admissible evidence in all respects that were material to the issues being determined in this proceeding. In addition, to the extent the evidence rebutted Respondent's charge made before the hearing that the statements were the product of improper influence or fabrication, the evidence would not constitute hearsay. *See* § 90.801(2)(b), Fla. Stat.

[18] The 2009 version of the disciplinary guidelines cross-referenced the Principles of Professional Conduct then-codified in Florida Administrative Code Rule 6B-1.006, but rather than setting a penalty range for each principle, penalty ranges were provided for particular types of conduct falling within individual Principles of Professional Conduct. The cited penalty range above applied to the "[f]ailure to protect or supervise students in violation of [rule] 6B-1.006(3)(a)." Rule 6B-1.006(3)(a) contained the principle now codified in rule 6A-10.081(2)(a)1.: "[Obligation to the student requires that the individual] [s]hall 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." The disciplinary guidelines rule as amended in 2018 and recalibrated to the transferred Principles of Professional Conduct now provides a penalty range of reprimand to revocation for a violation of rule 6A-10.081(2)(a)1.

harmful conditions, she was responsible for creating conditions that were harmful to the physical and mental health and safety of a young [redacted].

77. A troubling aggravating factor is Respondent's unwillingness to accept responsibility for creating the conditions that allowed the bathroom incident to occur. Instead, Respondent attempted to deflect blame for this incident to the administration of Millennia Gardens, based on her claim that she did not receive enough support or training for her re-entry to classroom teaching. While the technology for teaching students in a digital school environment may have been new, Respondent's supervisory responsibilities to her students were not new. The Principle of Professional Conduct that she violated was not new. Her acceptance of the School District's assignment to Millennia Gardens, and of the assignment to the open position as first-grade teacher there, was her representation that she was capable of meeting her professional responsibilities in that setting. If she did not think she could abide by the Principles of Professional Conduct as a classroom teacher, it was incumbent on her to decline the placement.

78. Similarly, Respondent sought to deflect responsibility by arguing that her failure to adequately supervise her class should be excused because one or two of the [redacted] involved—[redacted] and [redacted]—may have been about to undergo an evaluation process that could ultimately culminate in an IEP and/or a BIP being formulated for either or both students. At the time of the bathroom incident, however, no such determination had been made; the evaluation process may not have even begun. Respondent may have just made that recommendation or may have been about to make the recommendation at the time of the bathroom incident. The beginning of such an evaluation process is far from a formalized determination that any form of support is warranted. Respondent's supervisory obligations did not cease upon her making a recommendation that students be evaluated.

79. More was required of Respondent. When [redacted] and [redacted] began their disruptive ways in the beginning of [redacted] Respondent needed to

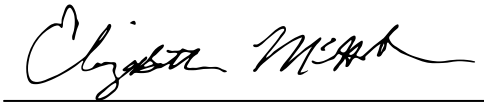
increase her vigilance. She needed her eyes on those [redacted] at all times, especially knowing that, if allowed, they would run into the bathroom together to hide. Respondent was professionally obligated to make reasonable effort to protect her students from conditions harmful to their mental and/or physical health and/or safety. Instead, Respondent's failure to employ heightened awareness—to adequately supervise her students— created the conditions that were harmful to [redacted]'s mental and physical health and safety. This was a serious dereliction of one of Respondent's most basic professional responsibilities: keeping the students in her care safe.

80. Consideration of the mitigating and aggravating circumstances do not warrant imposition of a penalty outside the normal range. Petitioner has proposed a penalty at approximately the midpoint of the normal range, to include a two-year suspension followed by two years of probation, a requirement to take a college level course in professional ethics for educators, and payment of a $750.00 fine. Respondent did not propose an alternative penalty, arguing only for the unsupportable outcome of dismissal of the Administrative Complaint. Petitioner's proposed penalty is reasonable.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a final order finding that Respondent violated section 1012.795(1)(j) through a violation of rule 6A-10.081(2)(a)1., and imposing the following as penalties: suspension of Respondent's educator's certificate for a period of two years from the date of the final order; probation for a period of two years after the suspension, with conditions to be determined by the Education Practices Commission; a requirement that Respondent take a college level course in professional ethics for educators; and payment of a $750.00 fine.

DONE AND ENTERED this 29th day of December, 2020, in Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
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 29th day of December, 2020.

COPIES FURNISHED:

Tobe M. Lev, Esquire
Egan, Lev, Lindstrom & Siwica, P.A.
231 East Colonial Drive
Orlando, Florida 32801
(eServed)

Heidi S. Parker, Esquire
Egan, Lev, Lindstrom & Siwica, P.A.
231 East Colonial Drive, 2nd Floor
Orlando, Florida 32801
(eServed)

Ron Weaver, Esquire
Post Office Box 770088
Ocala, Florida 34477-0088
(eServed)

Lisa M. Forbess, Interim Executive Director
Education Practices Commission
Department of Education
Turlington Building, Suite 316
Tallahassee, Florida 32399
(eServed)

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

Randy Kosec, Jr., Chief
Office of Professional Practices Services
Department of Education
Turlington Building, Suite 224-E
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.

STATE OF FLORIDA
EDUCATION PRACTICES COMMISSION

RICHARD CORCORAN, as
Commissioner of Education,

Petitioner,

v.

EPC No. 21-0002-RT
DOAH No. 19-6755PL

DOROTHY MEISTER,

Respondent.
_____/

RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER

The Respondent, DOROTHY MEISTER ("Meister"), by and through Heidi B. Parker and the law firm of Egan, Lev & Siwica, P.A., excepts to Administrative Law Judge Elizabeth W. McArthur's ("ALJ") recommended order pursuant to Rule 28-106.217(1), F.A.C., as follows:

SUMMARY

Meister is a long-time professional services contract teacher with Orange County Public Schools ("OCPS"). In 30 years, her disciplinary record was flawless prior to the alleged incident in the [redacted] school year. There was insufficient evidence to support that the students involved in this case were under Meister's direct supervision at the time of the incident. The date, time and specifics about what occurred and who was involved are inconsistent and lack corroboration. On this evidence, Judge McArthur issued the severe punishment of a two-year suspension and two years' probation.

EXCEPTIONS

1. Finding of Fact, paragraph 59.

The ALJ erred in finding that there was credible testimony to establish that Meister was in the classroom at the time of the incident. 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 explicit, and the witnesses must be lacking in confusion as to the facts in issue." *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). The clear and convincing evidence standard "may be met where the evidence is in conflict, but it seems to preclude evidence that is ambiguous." *Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc.*, 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

There was not clear and convincing evidence that Meister was in the classroom at the time the students were in the bathroom. In *Griffin v. State*, 526 So.2d 752 (Fla. 1st DCA 1988), the court stated,

> In evaluating a child's ability to observe, recollect, and narrate facts, courts are sensitive to the possibility that the child's statements may have been influenced either by parents or other authority figures. For example, in *Davis v. State*, 348 So.2d 1228, 1229-1230 (Fla. 3d DCA 1977), after a careful examination of the record, the district court determined that the trial court abused its discretion in allowing the fiveyear old child to testify at trial, finding the record permeated with evidence that the parents had "refreshed" the child's memory of the alleged incident a number of times. Citing *Bell v. State*, 93 So.2d at 577, for the proposition that a competency determination is subject to appellate review, the district court reversed and remanded for a new trial.

The students did not have a distinct memory of what occurred. [redacted] testified that Meister was outside of the classroom at the time [redacted] was in the bathroom. (Ex. P-23, Tr. 8). However, [redacted] also stated that Meister released her to go to the bathroom and that when [redacted] came out of the bathroom, Meister was on the school phone. (Ex. P-23, Tr. 9). [redacted] testified, [redacted] after the incident, that Meister was in the classroom. (R.O., ¶

59). It is highly unlikely that [redacted] had an independent recollection of something that occurred [redacted] earlier, at the age of six, without [redacted] recollection being refreshed by an adult.

The ALJ discounted the science about child witnesses and the importance of using proper interview techniques to elicit accurate information. (R.O., ¶¶ 51-55). Children can create false memories if they are introduced to outside information that was not part of the original event. (Tr. 399). The risk is that some of those pieces of false information can be permanently implanted into the children's memories. (Tr. 399). When the child attempts to recall the information at a later date, the child may not be able to differentiate between what actually happened and the outside information. (Tr. 399). In this case, there were repeated interviews of the same child with multiple adults in the room. (Tr. 433).

The quantity and quality of memory decreases over time. (Tr. 438). It is important to collect witness statements as close to the time that the event occurred as possible. (Tr. 438). Interviewer bias can occur from the interviewer having information and then asking questions to confirm the information during the interview. (Tr. 403). It is important to go into an interview to test the hypothesis that nothing happened in order to counter any bias that something happened. (Tr. 403).

McGraw's hearsay testimony about what the students told her cannot be used as a basis to find clear and convincing evidence that Meister was in the classroom. McGraw testified, [redacted] after the incident, that the students told her that Meister was in the classroom. However, McGraw at no time recorded the interviews as they occurred. She did not take notes during or after the interviews. The only statement from McGraw, written closer in time to the events that occurred, was a police report witness statement. In that

statement, McGraw did not mention anything about where Meister was because, as noted by the ALJ, whether Meister met her supervisory responsibilities was not important in a police investigation of what the [redacted] did to [redacted] in the bathroom. (R.O. ¶ 37, fn 12). However, it is important to the determination of whether McGraw's hearsay testimony was credibly supported by reliable evidence.

The ALJ focused on McGraw's hearsay testimony that was unsupported by credible evidence. (R.O., ¶ 59). "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." § 120.57(1)(c), Fla. Stat. Hearsay is admissible in administrative proceedings, but "hearsay alone does not constitute competent, substantial evidence." *L.G.H. v. Dep't of Children & Family Servs.*, 735 So. 2d 548, 548 (Fla. 1st DCA 1999). McGraw testified that [redacted] and the three [redacted] told her that Meister was in the classroom at the time of the bathroom incident. *Id.* The students allegedly told McGraw this information approximately two months after it was alleged to have occurred.

The ALJ incorrectly found that McGraw's testimony and the [redacted]' written statements supplemented and explained [redacted] and [redacted]'s testimony. (R.O., ¶ 35, fn 11). However, [redacted] and [redacted].'s statements were hearsay unsupported by credible evidence. They were hearsay that would have been excluded as such in a civil action. [redacted] and [redacted] did not testify at hearing. Additionally, none of the students' written statements said anything about where Meister was when they were in the bathroom. (Ex. P-6-9). The [redacted]' statements did not at all support [redacted] and [redacted]'s testimony.

The ALJ recognized there that there were inconsistencies in the students' recollection and description of the details of the incident. (R.O., ¶ 50). She dismissed these inconsistent statements as irrelevant to the issue of whether Meister failed to protect her students. However, they are relevant to the issue of whether the students' statements to McGraw and their testimony credibly supported that Meister was in fact in the classroom at the time of the incident.

The ALJ failed to consider the credibility considerations of the students' statements to her and McGraw's recollection. There was no documentation to support McGraw's hearsay testimony [redacted] after the incident. (Tr. 414). Adults are notoriously bad at remembering exactly what questions they ask. (Tr. 414). Interviewers tend to forget the questions they ask, overestimate the number of open-ended questions they ask and underestimate the number of closed, suggestive, leading questions that they ask. (Tr. 415).

The evidence from the students' perspective, or lack thereof, coupled with Meister's testimony that she had to leave her classroom when she was needed in the office or when she needed to use the bathroom is insufficient to conclude that Meister was in the classroom. (See Tr. 485). Meister credibly and undisputedly testified that she had a paraprofessional come to the classroom to supervise her students when she needed to leave the room. (Tr. 485). In the fall of 2017, Meister testified, she left her classroom on a few occasions under a paraprofessional's supervision. (Tr. 485). She never left her classroom unattended. (Tr. 485). She was gone from five to thirty5 to 30 minutes, depending on the situation. (Tr. 485). Significantly, Meister credibly testified that she did not know that the incident occurred. (Tr. 93).

The more credible evidence was that of [redacted]'s mother, [redacted]. [redacted] testified that when [redacted] initially told her about the incident, [redacted] said Meister was not in the classroom at the time. (Ex. P-24, Tr. 7). Louis testified that [redacted] probably forgot that Meister was not in the classroom when the bathroom incident occurred because "it happened [redacted] ago." (Ex. P-24, Tr. 7).

2. Findings of Fact, paragraphs 14-15.

The ALJ incorrectly characterized the facts in this case. Meister recalled two times that students were in the bathroom together. (Tr. 471). One time, two girls went in the bathroom together and Ms. Meister opened the bathroom door, saw they were sharing bubble gum and told them to get out of the bathroom. (Tr. 472). On other occasions, when Ms. Meister called SWAT, the behavior team, [redacted] and [redacted] would go into the bathroom together to hide. (Tr. 471-472, 541).

In early [redacted], Ms. Meister saw [redacted] and [redacted] go into the bathroom together. (Tr. 472-473). Ms. Meister immediately walked across the classroom, opened the door and told the kids to come out of the bathroom. (Tr. 472-473). Ms. Meister did not see any signs of abuse, and neither child said anything to Ms. Meister. (Tr. 473).

The ALJ found that there was no supervision during these instances. This is clearly false. Meister immediately addressed these situations and got the children out of the bathroom. When Meister called SWAT, she waited for the behavior team to come help her with [redacted] and [redacted] because they needed special attention and did not listen to her. Finally, there was no credible, supported non-hearsay evidence that Meister had to unlock the door to get multiple students out of the bathroom.

3. **Conclusion of Law, paragraphs 74, 77-79.** The ALJ found that Meister created the conditions that allowed the bathroom incident to occur and found as an aggravating factor that Meister was unwilling to accept responsibility for creating such conditions. The record evidence did not support these conclusions. There was a substantial amount of credible evidence that Meister admitted and sought help for the students in Meister's classroom who were difficult for her to manage in terms of their behaviors. Meister took extraordinary measures to get help for the conditions in her classroom.

Meister had started the process to get help for [redacted] and [redacted] (Tr. 498). Schneider Panico, a behavioral specialist, testified that the behavioral team started a functional behavioral assessment as part of the MTSS process for [redacted] and [redacted] (Tr. 542). The MTSS process preceded a behavior improvement plan ("BIP") or individual education plan ("IEP") for a student. (Tr. 538, 543-544). An IEP or BIP can provide the student access to time with an ESE (exceptional student education) teacher for academics or social skills. (Tr. 538). Students can get extra support in the classroom. (Tr. 538). During the fall of [redacted], Meister got help from the School Wide Assistance Team ("SWAT"), comprised of instructional coaches, a behavioral specialist and/or MTSS coach. (Tr. 479, 520-521). Students who needed more attention were placed in small classes or assigned a paraprofessional in the mainstream classroom to work with the child one on one. (Tr. 498).

At the beginning of the school year, a coordinator reached out to Meister to offer a mentor, and Meister eagerly said she wanted a mentor. (Tr. 477). Lyon, instructional coach and curriculum resource teacher, wrote in her notes that Meister "is open for help

and guidance in every way." (Ex. P-18 (60-61). Meister continued to get coaching support throughout October, specifically to deal with classroom behavior and instruction. (Id.). Haas, an instructional coach, testified that Meister had an exceptionally difficult first-grade class in comparison with other first-grade classes. (Tr. 551). Hass observed Meister try every strategy that was suggested to her and implement the tools that she was taught to the best of her ability. (Tr. 557).

The ALJ concluded that the date of the incident was supported by clear and convincing evidence to be [redacted]. (R., ¶ 44). There was strong supporting evidence that on [redacted], Meister did the opposite of "creating the conditions that allowed the bathroom incident to occur." On [redacted], Meister called the SWAT three times because of [redacted]'s behavior, at 8:53 a.m., 9:50 a.m., and 12:50 p.m. (Ex. P-25). Schneider wrote a statement about the events that occurred on September 28, 2017. (Ex. R-6). Class started at 8:45 a.m. and Meister called for the SWAT at 8:53 a.m. (Tr. 539-540). At 9:50 a.m., [redacted] was standing on a desk and Meister called SWAT again. (Tr. 540).

The SWAT removed P.C. from class after the second call on [redacted], but then returned [redacted] to class. (Tr. 540). At 12:45 p.m. or 12:50 p.m., Meister called the office again. (Ex. R-6). When Schneider arrived, [redacted]. was under a table. (Id.). Meister reported that [redacted] was standing on desks and hitting other students. (Id.). Schneider stayed in class for a period of time until [redacted] could sit and do his work and then she left. (Id.). There was no evidence that Meister created the environment that caused [redacted] and [redacted] to repeatedly act out.

4. Conclusion of Law, paragraph 80 and Recommendation.

The ALJ failed to sufficiently mitigate the penalty in this case pursuant to rule 6B-11.007(3), F.A.C. In 2017, the range of penalties for violation of rule 6A-10.081(2)(a)1 was probation to revocation. Rule 6B-11.007(2)(j)(1), F.A.C. The ALJ's recommendation did not properly apply the disciplinary guidelines.

The ALJ failed to deviate from the Petitioner's recommendation of two years' suspension, twoyears' probation, completion of a college level course and a $750 fine. The ALJ found that the mitigating and aggravating factors cancelled each other out. However, the record establishes that the mitigating factors outweigh the aggravating factors in this case.

(a) The severity of the offense: The severity of the offense was defined by the harm to [redacted] and that was serious indeed.

However, the mitigating factors require a period of probation as opposed to a suspension.

(b) The danger to the public: None. In the last [redacted] since the incident, Meister has remained employed at Orange County Public Schools and has had no similar incidents. She, likewise, had no such incidents in the more than 30 years as a public school teacher.

(c) The number of repetitions of offenses: There has been no repetition.

(d) The length of time since the violation: [redacted].

(e) The number of times the educator has been previously disciplined by the Commission: None.

(f) The length of time the educator has practiced and the contribution as an educator: Meister has been an educator for more than 30 years and always had above average evaluations prior to [redacted].

(h) The deterrent effect of the penalty imposed: Meister has received a sufficient deterrent effect from the proceedings against her. However, a suitable probationary period is a deterrent. In contrast, a two-year suspension at this stage in Meister's career will prevent her from ever working in the public schools again.

(i) The effect of the penalty upon the educator's livelihood: Meister continues to be employed at Orange County Public Schools. A suspension will result in her being terminated upon entry of the final order.

(k) The actual knowledge of the educator pertaining to the violation: There was no evidence, and the ALJ made no finding, that Meister had actual knowledge of the incident that occurred.

(l) Employment status: Meister currently is employed, on leave with pay pending the outcome of this proceeding, at Millennia Gardens Elementary School. If Meister is suspended by the EPC, she will be terminated from employment.

(n) Related violations against the educator in another state including findings of guilt or innocence, penalties imposed and penalties served: None.

(o) Actual negligence of the educator pertaining to any violation: None.

(p) Penalties imposed for related offenses under subsection (2) above: None.

CONCLUSION

For the reasons set forth above, Meister requests that, at most, she be issued a period of probation.

Respectfully submitted,

/s/ Heidi B. Parker
Heidi B. Parker
FL Bar No. 1008110
EGAN, LEV & SIWICA, P.A.
Post Office Box 2231
Orlando, Florida 32802
Telephone: (407) 422-1400
Facsimile: (407) 422-3658
Primary: hparker@eganlev.com
Secondary: dvaughan@eganlev.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Exceptions were sent via electronic mail this 13th day of January 2021 to Ron Weaver, ron@ronweaverlaw.com.

/s/ Heidi B. Parker

STATE OF FLORIDA
EDUCATION PRACTICES COMMISSION

RICHARD CORCORAN, as
Commissioner of Education,

Petitioner,

vs. DOAH Case No. 19-6755PL
EPC Case No. 21-0002-RT

DORETHY MEISTER,

Respondent.
_____/

PETITIONER'S RESPONSE TO RESPONDENT'S
EXCEPTIONS TO RECOMMENDED ORDER

Petitioner, Richard Corcoran, as Commissioner of Education, by and through his undersigned attorney, pursuant to Rule 28-106.217(3), Florida Administrative Code, hereby files Petitioner's Response to Respondent's Exceptions to the Recommended Order, and in support thereof, states the following.

PRELIMINARY STATEMENT

This matter comes before the Education Practices Commission (the "EPC") for final agency action after an administrative hearing before an Administrative Law Judge (ALJ) of the Florida Division of Administrative Hearings (DOAH). A Recommended Order (RO) was issued by the ALJ on December 29, 2020. On January 13, 2021, Respondent, Dorothy Meister, filed exceptions to the RO.

There is competent, substantial evidence in the record to support all of the ALJ's findings of fact and conclusions of law, and the recommended penalty is within the authorized range of penalties. Therefore, Respondent's exceptions must be rejected.

STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes, which provides, in pertinent part, as follows:

> (l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. **When rejecting or modifying such conclusion of law** or interpretation of administrative rule, the

> agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. **The agency may not reject or modify the findings of fact unless** the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action. (emphasis added)

APPLICABLE CASE LAW

Florida court decisions also limit the EPC's authority to overturn or modify an ALJ's findings of fact, conclusions of law, and a recommended penalty.

The 1st DCA in *Heifetz v. Dep't of Bus. Reg.,* 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985), and a plethora of subsequent cases, provides guidance to agencies in reviewing exceptions to an ALJ's recommended order. In *Heifetz*, the court stated:

> Despite a multitude of cases repeatedly delineating the different responsibilities of hearing officers and agencies in deciding factual issues, we too often find ourselves reviewing final agency orders in which findings of fact made by a hearing officer are rejected because the agency's view of the evidence differs from the hearing officer's view, even though the record contains competent, substantial evidence to support the hearing officer's findings. So once again we find it necessary to explain the respective roles of hearing officers and agencies in section 120.57 proceedings.
>
> Section 120.57(1)(b)9, Florida Statutes (1983), mandates that an agency accept the factual determinations of a hearing officer unless those findings of fact are not based upon "competent substantial evidence." A number of cases have defined the competent, substantial evidence standard. The seminal case is *De Groot v. Sheffield*, 95 So.2d 912 (Fla.1957), in which the Florida Supreme Court described it as "such evidence as will establish a substantial basis of fact from **which the fact at issue can be reasonably inferred**" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." 95 So.2d at 916. Since this oft-cited definition is somewhat broad and capable of diverse interpretations and applications,

> the following rules for agency review of proposed orders should help agencies understand and properly apply the accepted view of the competent, substantial evidence standard.
>
> Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact. *McDonald v. Department of Banking & Finance*, 346 So.2d 569 (Fla. 1st DCA 1977**). It is the hearing officer's function to** consider all the evidence presented, resolve conflicts, judge credibility of witnesses, **draw permissible inferences from the evidence**, and reach ultimate findings of fact based on competent, substantial evidence. *State Beverage Department v. Ernal, Inc.*, 115 So.2d 566 (Fla. 3d DCA 1959). If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. **The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred**. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion. We recognize the temptation for agencies, viewing the evidence as a whole, to change findings made by a hearing officer that the agency does not agree with. As an appellate court, we are sometimes faced with affirming lower tribunal rulings because they are supported by competent, substantial evidence even though, had we been the trier of fact, we might have reached an opposite conclusion. As we must, and do, resist this temptation because we are not the trier of fact, so too must an agency resist this temptation since it is not the trier of ordinary factual issues not requiring agency expertise. *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages & Tobacco,* 475 So.2d 1277, 1281-1282, 10 Fla. L. Weekly 2142 (Fla. App. 1985) (emphasis added)

In order to reject the ALJ's conclusion of law "the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law ... is as or more reasonable than that which was rejected or modified." Section 120.57(1)(l), Fla. Stat. (2017). A reviewing court will sometimes reverse an agency determination that its conclusion of law is as or more reasonable than that which was rejected or modified. "An agency is not permitted to 'reject a finding that is substantially one of fact simply by treating it as a legal conclusion.' *Yerks v. Sch. Bd. of Broward Cnty.,* 219 So.3d 844, 850 (Fla. App. 2017). Furthermore, in *Heifetz,* the court noted that "[a]lthough stated in terms of a conclusion of law in both the recommended order and final order, negligent supervision and lack of diligence are essentially ultimate findings of fact clearly within the realm of the hearing officer's fact-finding discretion." *Heifetz* at 1282.

Regarding the penalty. In *Criminal Justice Standards v. Bradley*, 596 So. 2d 661, 663 (Fla. 1992), the Florida Supreme Court stated, "[I]t is the primary function of professional disciplinary boards to determine the appropriate punishment for the misconduct of professionals it regulates." The Florida Supreme Court went on to hold, "[a]s long as the statute under which a professional agency operates provides guidelines for imposing penalties, the agency complies with Section 120.57, and the increased penalty falls within the guidelines established by its statute, a professional board or agency has the discretion to increase the recommended penalty." *Bradley*, 596 So. 2d at 663.

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS

RESPONDENT'S EXCEPTION 1 - Respondent takes exception to factual findings contained in paragraph 59 of the RO, which states as follows:

> 59. The credible testimony of both [redacted] and [redacted] established that Respondent was in the classroom at the time of the bathroom incident. [redacted] testified that Respondent was the one who gave her permission to go to the bathroom when [redacted] raised her hand. ([redacted] depo transcript, PE#23, p. 10-11). [redacted]. also testified that Respondent was in the classroom when [redacted], [redacted], and [redacted] went into the bathroom. (T: 121). And both [redacted] and [redacted] testified that Respondent was in the classroom when they came out of the bathroom. [redacted] added that Respondent was on the school phone when [redacted] left the bathroom. ([redacted] depo transcript, PE#23, p. 13). While there were details that neither [redacted] nor [redacted] could recall about the bathroom incident, testifying nearly [redacted] after it occurred, their testimony was clear, credible, and consistent regarding Ms. Meister's presence in the classroom at the time of the bathroom incident.[15] Their testimony on this point was corroborated by Ms. McGraw's clear testimony that [redacted] and the [redacted] told her Ms. Meister was in the classroom at the time of the bathroom incident when that incident was first revealed on [redacted]. (T: 161).

There is competent substantial evidence in the record to support the findings in paragraph 59. See references to the record in parenthesis above.

While reasonable people can differ about the facts, an agency is bound by the hearing officer's reasonable inferences based on the conflicting inferences arising from the evidence. *Greseth v. Dep't of Health & Rehab. Servs*, 573 So.2d 1004, 1006–1007 (Fla. 4th DCA 1991). The testimony at the final hearing was such that the administrative law judge could reasonably conclude that Respondent was in the classroom at the time of the incident.

Therefore, Respondent's exception 1 must be rejected.

RESPONDENT'S EXCEPTION 2 - Respondent takes exception to factual findings contained in paragraphs 14 and 15 of the RO, which states as follows:

> 14. Respondent knew that, in defiance of her rule, sometimes more than one student would go into the bathroom at the same time. (T: 471). Respondent acknowledged that there were multiple occasions when [redacted] and [redacted] would run into the bathroom together to hide when they were in trouble. (T: 471, 472). (These occasions would have been before October 12, 2017, when [redacted] was transferred to another class.). (T: 470, 471). Another time, two girls went into the bathroom together to share chewing gum. (T: 471, 472). When Respondent noticed multiple students going into the bathroom together, she would order them out, unlocking the door if necessary. (T: 472).
>
> 15. Although Respondent knew that sometimes multiple students went into the bathroom together—a risky, potentially dangerous situation given the lack of any supervision—Respondent did not employ special procedures or increase her vigilance to ensure she would be aware of, and thwart, attempts by multiple students to disappear into the bathroom. In Respondent's small classroom, heightened vigilance would have meant keeping eyes on, and knowing the whereabouts of, all students—particularly the troublemakers. (T: 503, 505, 507).

There is competent substantial evidence in the record to support the findings in paragraphs 14 and 15 of the R.O. See references to the record in parenthesis above.

Respondent contends that the ALJ "incorrectly characterized the facts in this case." The ALJ correctly characterized the evidence based upon the testimony in the record. Respondent also contends "the ALJ found that there was no supervision during these instances. This is clearly false." The fact that the students were able to go into the restroom together at all clearly shows Respondent's lack of supervision.

Therefore, Respondent's exception 2 must be rejected.

RESPONDENT'S EXCEPTION 3 - Respondent takes exception conclusions of law in paragraphs 74 and 77-79 of the RO, which states as follows:

> 74. Based on the Findings of Fact above, Petitioner proved that Respondent violated section 1012.795(1)(j) through a violation of rule 6A-10.081(2)(a)1. Respondent had a professional obligation to make reasonable effort to protect her students from conditions that were harmful to their mental and/or physical health and/or safety. Instead, the credible evidence clearly and convincingly established that Respondent failed to adequately supervise her first-grade class, creating the conditions that

proved to be harmful to [redacted]'s mental and physical health and safety.[17]

77. A troubling aggravating factor is Respondent's unwillingness to accept responsibility for creating the conditions that allowed the bathroom incident to occur. Instead, Respondent attempted to deflect blame for this incident to the administration of Millennia Gardens, based on her claim that she did not receive enough support or training for her re-entry to classroom teaching. While the technology for teaching students in a digital school environment may have been new, Respondent's supervisory responsibilities to her students were not new. The Principle of Professional Conduct that she violated was not new. Her acceptance of the School District's assignment to Millennia Gardens, and of the assignment to the open position as first-grade teacher there, was her representation that she was capable of meeting her professional responsibilities in that setting. If she did not think she could abide by the Principles of Professional Conduct as a classroom teacher, it was incumbent on her to decline the placement.

78. Similarly, Respondent sought to deflect responsibility by arguing that her failure to adequately supervise her class should be excused because one or two of the [redacted] involved—[redacted] and [redacted]—may have been about to undergo an evaluation process that could ultimately culminate in an IEP and/or a BIP being formulated for either or both students. At the time of the bathroom incident, however, no such determination had been made; the evaluation process may not have even begun. Respondent may have just made that recommendation or may have been about to make the recommendation at the time of the bathroom incident. The beginning of such an evaluation process is far from a formalized determination that any form of support is warranted. Respondent's supervisory obligations did not cease upon her making a recommendation that students be evaluated.

79. More was required of Respondent. When [redacted] and [redacted] began their disruptive ways in the beginning of September [redacted], Respondent needed to increase her vigilance. She needed her eyes on those [redacted] at all times, especially knowing that, if allowed, they would run into the bathroom together to hide. Respondent was professionally obligated to make reasonable effort to protect her students from conditions harmful to their mental and/or physical health and/or safety. Instead, Respondent's failure to employ heightened awareness—to adequately supervise her students— created the conditions that were harmful to [redacted]'s mental and physical health and safety. This was a serious dereliction of one of Respondent's most basic professional responsibilities: keeping the students in her care safe.

Respondent contends that "the ALJ found that Meister created the conditions that allowed the bathroom incident to occur and found as an aggravating factor that Meister was unwilling to accept responsibility for creating such conditions. The record evidence did not support these conclusions." (Resp. ex., page 7, paragraph 3, lines 1-4).

Although stated in terms of a conclusion of law, the ALJ's finding that Meister created the conditions that allowed the bathroom incident to occur (i.e., negligent supervision and lack of diligence) is essentially ultimate findings of fact within the realm of the ALJ's fact-finding discretion. See *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages & Tobacco,* 475 So.2d 1277, 1282, 10 Fla. L. Weekly 2142 (1st DCA 1985). There is competent substantial evidence in the record that Respondent failed to adequately supervise the students and secure the bathroom. There is also evidence in the record that Respondent did not accept responsibility for such failure. Respondent's primary defense in this case was that she was put in a position for which she was not qualified, and that she did not receive the support from administration that she thought should have been provided. See Respondent's testimony at T: 457-507.

Therefore, Respondent's exception 3 must be rejected.

RESPONDENT'S EXCEPTION 4 - Respondent takes exception conclusions of law in paragraph 80 and the ALJ's recommended penalty.

> 80. Consideration of the mitigating and aggravating circumstances do not warrant imposition of a penalty outside the normal range. Petitioner has proposed a penalty at approximately the midpoint of the normal range, to include a two-year suspension followed by two years of probation, a requirement to take a college level course in professional ethics for educators, and payment of a $750.00 fine. Respondent did not propose an alternative penalty, arguing only for the unsupportable outcome of dismissal of the Administrative Complaint. Petitioner's proposed penalty is reasonable.

Respondent contends that "the ALJ failed to sufficiently mitigate the penalty in this case. . ." and "the ALJ did not properly apply the disciplinary guidelines." Respondent's exception is without merit. The ALJ specifically stated "The applicable mitigating and aggravating circumstances . . . have been considered." The ALJ then went on to explain some of the factors she considered.

Paragraph 80 indicates the ALJ took into consideration mitigating factors pursuant to rule 6B-11.007(3) in determining what she believed to be the appropriate penalty in this

case. After finding that the Respondent violated rule 6A-10.081(2)(a)1., and taking into consideration mitigating factors, the ALJ recommended that "pay a fine of $750, and that her certificate be suspended for a period of one year, followed by two years of probation, with terms and conditions to be determined by the Education Practices Commission."

An administrative agency may increase or reduce a proposed penalty in a recommended order, but it may only do so where it "review[s] ... the complete record and [states] with particularity its reasons therefor in the order, by citing to the record in justifying the action." § 120.57(1)(l). The purpose of this statute "is to provide some assurance that the agency has gone through a thoughtful process of review and consideration before making a determination to change the recommended penalty." *Withers v. Blomberg, as Comm'r of Edu.*, 41 So. 3d 398, 400 (2nd DCA 2010)(Citing *Hutson v. Casey*, 484 So.2d 1284, 1285-86 (Fla. 1st DCA 1986).

The Florida Supreme Court has stated that "so long as the penalty imposed [by an administrative agency] is within the permissible range of statutory law, the appellate court has no authority to review the penalty unless agency findings are in part reversed." *Fla. Real Estate Comm'n v. Webb*, 367 So.2d 201, 201 (Fla.1978); *Weiss v. Dep't of Bus. & Prof'l Regulation*, 677 So.2d 98 (Fla. 5th DCA 1996)(affirming revocation of broker's license, which was allegedly too harsh a penalty, citing Webb); *Clark v. Dep't of Prof'l Regulation, Bd. of Med. Exam'rs,* 463 So.2d 328 (Fla. 5th DCA 1985)(affirming revocation of medical license based on Webb).

The recommended penalty is in the permissible range and appropriate, and therefore should be adopted by the EPC.

For the foregoing reasons, Petitioner respectfully requests the EPC to deny each of Respondent's exceptions and adopt the ALJ's Recommended Order in its entirety.

Respectfully submitted this 16th day of November, 2020.

/s/ Ron Weaver

_____

RON WEAVER
Florida Bar No. 486396
Post Office Box 770088
Ocala, Florida 34477-0088
Telephone: 850.980.0254
Email: ron@ronweaverlaw.com
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded by email this 18th day of January, 2021 to: Heidi Parker, Esquire (hparker@eganlev.com).

/s/ Ron Weaver

RON WEAVER