

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD CORCORAN, AS COMMISSIONER
OF EDUCATION,

Petitioner,

vs.

Case No. 20-0148PL

DIANE VELEZ,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge Lisa Shearer Nelson conducted a hearing on August 13, 2020, pursuant to section 120.57(1), Florida Statutes (2020), by means of Zoom technology.

APPEARANCES

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

For Respondent: Stephanie Marisa Schaap, Esquire
Duval Teachers United
1601 Atlantic Boulevard
Jacksonville, Florida 32207

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent, Diane Velez, violated section 1012.795(1)(g) and (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 July 31, 2019, Petitioner, Richard Corcoran, in his capacity as Commissioner of Education (Petitioner), filed an Administrative Complaint against Respondent, alleging that she violated section 1012.795(1)(g) and (j), based on the alleged lack of supervision of an exceptional education student in her classroom. Respondent filed an Amended Election of Rights disputing the allegations in the Administrative Complaint and requesting a hearing pursuant to section 120.57(1). The case was referred to the Division of Administrative Hearings (the Division) on January 15, 2020, and assigned to Administrative Law Judge Suzanne Van Wyk.

On January 31, 2020, a Notice of Hearing was issued, scheduling the case for hearing on May 1, 2020, and on February 10, 2020, the case was transferred to Administrative Law Judge Lisa Shearer Nelson. On March 20, 2020, Petitioner filed an Unopposed Motion to Continue Final Hearing, alleging that because of the state of emergency declared based on the COVID-19 coronavirus pandemic, schools were closed, and completing the necessary discovery to prepare for hearing was not possible. By Order dated that same day, the case was continued, and the parties were directed to provide a status report no later than April 17, 2020.

On April 24, 2020, based on the parties' Joint Status Report, the case was rescheduled for August 13, 2020, by video teleconference with sites in Jacksonville and Tallahassee. However, as citizens were still encouraged to wear masks and engage in social distancing in order to stem the spread of COVID-19, there was a concern that the video conference room in Jacksonville might not be large enough to accommodate the parties, attorneys, and witnesses necessary to conduct the hearing. A Procedural Order was issued, directing the parties to provide an estimate of the number of people that would be present in the courtroom, and where the parties

anticipated any witnesses would wait before testifying. Based on the responses provided, it was determined that the video conferencing room in Jacksonville would not provide adequate space to allow for social distancing. A status conference was conducted on June 4, 2020, to address the hearing location, and as a result of the status conference, the hearing was relocated to the Duval County School District headquarters. On August 5, 2020, the venue of the hearing was changed once again, this time to allow the proceedings to be conducted using Zoom technology.

The parties filed a Second Amended Joint Prehearing Statement which includes stipulated facts for which no proof at hearing is required, and those facts have been included in the Findings of Fact below. The Second Amended Prehearing Statement also amended paragraph three of the Administrative Complaint, as follows:

3. In or about January 11, 2018, Respondent failed to properly supervise her students, J.L., a female student with Williams Syndrome and an Individual Education Plan (IEP) and T.B., a male student in Respondent's class. Respondent allowed the two students to leave Respondent's classroom to go to the restroom at the same or overlapping times. J.L.'s IEP states that "She has Williams Syndrome which is a developmental disorder that affects many parts of her body" and that J.L. "is a very trusting child and will walk away with a stranger. She does not distinguish between friend from stranger and this can cause a danger to her safety." The IEP also states that J.L. "needs increased supervision to insure her safety." As J.L.'s teacher and case manager, Respondent was aware of J.L.'s IEP requirements. Additionally, on or about August 22, 2017, the Lead Exceptional Student Education (ESE) teacher at Respondent's school sent an email to J.L.'s teachers, including Respondent, which stated in part, that J.L. "cant (sic) be left alone she will leave with a complete stranger, when she uses the restroom she likes to

play in the restroom and whoever has her last period (sic) of the day make sure she uses the restroom.”

At hearing, J. Rebecca Raulerson, Billie Jay Hodges, Ronald Messick, and Lana Austin testified for Petitioner, and Petitioner’s Exhibits numbered 5 through 7, 9 through 13, and 15 through 17 were admitted into evidence. Respondent testified on her own behalf and presented the testimony of Jessica Kirkland. Respondent did not offer any exhibits.

The Transcript of the proceedings was filed with the Division on September 14, 2020. Respondent filed an unopposed motion for extension of time to file its proposed recommended order, which was granted, and the time for filing the post-hearing submissions was extended to October 2, 2020. Both parties timely filed Proposed Recommended Orders that were carefully considered in the preparation of this Recommended Order.

The Administrative Complaint contains allegations from the 2017-2018 school year, from August 2017 through March 2018. This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. *McCloskey v. Dep’t of Fin. Servs.*, 115 So. 3d 441, 444 (Fla. 5th DCA 2013). All references to Florida Statutes are to the 2017 codification unless otherwise indicated.

FINDINGS OF FACT

Based on the demeanor of the witnesses, the testimony given, and the documentary evidence received, the following Findings of Fact are made.

1. Respondent holds Florida Educator’s Certificate 789520, covering the areas of Elementary Education, English for Speakers of Other Languages, (ESOL), and Exceptional Student Education (ESE), which is valid through June 30, 2020.

2. At all times relevant to the allegations in the Administrative Complaint, Respondent was employed as an ESE teacher at Stillwell Middle School (Stillwell) in the Duval County School District. She has been teaching for approximately 20 years, with no prior discipline.

3. Respondent teaches in a wing at Stillwell that is referred to as the SLA Unit, which stands for Supported Level Academics. The students in the SLA Unit are cognitively delayed and have all of their classes in this self-contained unit.

4. The SLA Unit is located in a wing at the back of the school, near the bus loop. If someone is looking down the hall from the doors closest to the rest of the school, there are female and male bathrooms for students to the left and right, respectively, closest to those doors. From those bathrooms, there are five classrooms on each side of the hall. Ms. Velez's classroom is the third classroom on the right-hand side of the hallway.

5. There are additional restrooms in the wing, all congregated in the area between the third and fourth classrooms on the left hand side of the hallway. At least one of those bathrooms is entered from within a classroom.

6. Stillwell had a policy that if a student was given permission to leave the classroom, the student should not be gone for more than eight to ten minutes without the teacher calling for assistance to locate the student. Teachers could call for assistance from Ronald Messick, the lead ESE teacher; send a paraprofessional to look for the student; or call the front office or a resource officer. The eight-to-ten minute window was not a written policy, but was discussed during pre-planning meetings at the beginning of the year, as well as at faculty meetings. While attendance logs from pre-planning and faculty meetings were not introduced to establish that Respondent was present during faculty meetings or pre-planning meetings, no evidence was presented to indicate that she was absent.

7. In addition, the 2017-2018 Faculty Handbook (Handbook) for Stillwell had more than one section that addressed supervision of students. For

example, under the caption “Supervision of Students,” beginning on page 12 of the Handbook, it states:¹

It is the responsibility of the school to provide supervision for students in attendance. *It is the teacher’s responsibility to make sure that students in his/her charge are supervised at all times.* Teachers should be aware of the legal and progressive discipline aspects of failure to provide adequate supervision. Students should *always* have adult supervision.

8. Under the caption “Hall Passes,” on page 16 of the Handbook, it states:

Hall passes are to be used for **emergencies only**. In an effort to reduce the number of students out of class during instructional time, each classroom will have either a lime/orange vest or a Colored clipboard. *Students needing to leave the classroom are required to wear the vest or carry the clipboard.* Please make sure students continue to sign-out when leaving/returning to your classroom so if the vest/clipboard disappears, you will know who was in possession of it last. Only **one** student per class may be on a hall pass at any given time. If it is necessary that a student leave your classroom to go to an Administrative Office and your vest/clipboard is already being used, security will need to escort student(s) to and from the classroom.

While it is our desire that *no student be in the halls during instructional time*, there are absolutely **NO hall passes for any reason during the first/last 30 minutes of each class and NO hall passes during 2nd block each day** unless called by an Administrator. Students who are found out of class during the first/last 30 minutes of the block will have the vest or clipboard taken and given to the Assistant Principal for you to retrieve.

Students who are out of class, unaccompanied by security, and do not have a vest/clipboard will be

¹ All italics, underlining, and bold used in the quoted material is as it appears in the Handbook.

considered skipping and appropriate consequences will be assigned. The teacher will also be held accountable if not following school procedure.

9. Finally, under the heading “Hall and Campus Monitoring,” it states in all capitals and bold letters, **“STUDENTS SHOULD NEVER WALK BY THEMSELVES.”**

10. On or about January 11, 2018, J.L. was an 11-year-old female student in the sixth grade. J.L. was assigned to Respondent’s classroom, and has an Individual Education Plan (IEP). J.L. was a student in a class containing students who functioned cognitively at the lowest level for students at Stillwell. While those who testified could not state definitively what the IQ level was for the class, it was generally around 67-70. Ms. Velez described the class as one for which there was “a need to have eyes on them.”

11. J.L. was new to the school during the 2017-2018 school year.

12. On August 22, 2017, Ronald Messick sent an email to J.L.’s teachers, including Respondent, stating that J.L. could not be left alone and that she would “leave with a complete stranger.” He advised that when J.L. uses the restroom, she likes to play in it, and directed that the teacher who has J.L. the last period of the day needed to make sure she used the restroom.

13. J.L.’s mother had called Mr. Messick the first week of school with concerns that J.L. had been unsupervised in the bus pick-up area. Her mother explained her concerns to Mr. Messick regarding J.L.’s need for constant supervision. The email referenced making sure that J.L. went to the bathroom before boarding the bus simply because she would have a long ride home from school.

14. An IEP meeting was conducted for J.L. on October 12, 2017. Mr. Messick was present as the LEA (lead educational agency) representative, along with Ms. Velez, who wrote the IEP, and three others.

15. J.L.’s IEP states that “[s]he has Williams Syndrome which is a developmental disorder that affects many parts of her body.” The IEP also

states that J.L. “is a very trusting child and will walk away with a stranger. She does not distinguish friend from stranger and this causes danger to her safety,” and that J.L. “needs increased supervision to ensure her safety.” The statement that J.L. needs increased supervision to insure her safety is included in two separate sections of her IEP.

16. Respondent was J.L.’s case manager. As her case manager, Respondent reviews, completes entries, and inputs other appropriate data in J.L.’s IEP. She was aware of the information contained in J.L.’s IEP.

17. On January 11, 2018, J.L. was present in Ms. Velez’s classroom during the last period of the day. At approximately 2:05, she asked for, and received, permission to go to the bathroom.

18. Ms. Velez allowed J.L. to go by herself. No adult or other student accompanied her.

19. Allowing J.L. to go the restroom alone was not permitted by her IEP. Further, it appears to violate the policies outlined in the Handbook, which prohibits allowing hall passes for the first 30 minutes of each class. The final class of the day began at 2:05.² It also runs afoul of the email sent by Mr. Messick at the beginning of the school year, which specifically directed that J.L. not be left alone.

20. After J.L. was permitted to leave the classroom, T.B., a male student in Respondent’s class, also asked to go the bathroom, and was allowed to leave the classroom. Ms. Velez did not check to see where J.L. was before letting T.B. leave the classroom. T.B. was also unaccompanied.

21. J.L. was absent from the classroom for approximately 24 minutes. There are no credible circumstances presented at hearing by which a student should be absent from the classroom for that length of time, regardless of

² The Administrative Complaint does not charge Respondent with violating this policy, and no discipline is recommended for apparently doing so. It is included simply to show that there were multiple guidelines in place to prohibit allowing J.L. outside of the classroom alone.

their mental capacity, the policy contained in the Handbook, or any policy discussed at faculty meetings.

22. T.B. returned to the classroom before J.L. After he entered Ms. Velez's classroom, T.B. apparently told Ms. Velez that J.L. was in the boys' bathroom. Ms. Velez testified that she was about to look for her when J.L. returned to the classroom. Ms. Velez testified that she noticed J.L. had "a lot of energy," and was breathing hard and her hands were shaking.

23. Ms. Velez asked J.L. if she had been in the boys' bathroom, and testified at hearing that J.L. responded that she did not want to get in trouble. J.L. became upset and asked to speak with the school nurse. Ms. Velez allowed her to go to the nurse's office, this time accompanied by an eighth grade girl. While Ms. Velez described the child who accompanied J.L. as "very responsible," it is noted that she was also a child in this classroom of children who represented the lowest functioning students at Stillwell.

24. Lana Austin was the school nurse at Stillwell, and her office was down the hall from Ms. Velez's room in the SLA wing. She testified T.B. was in her office when J.L. arrived. It was not explained at hearing whether T.B. had also asked Ms. Velez to go to the nurse's office or just how he came to be there.

25. When she arrived at the nurse's office, J.L. was crying and somewhat distraught, and T.B. was also getting upset. Ms. Austin tried to get J.L. to tell her what was wrong, and J.L. kept saying they were trying to get her in trouble. J.L. wanted to call her mother, and Ms. Austin let her do so, because she believed it would calm her down. A paraprofessional came into Ms. Austin's office while J.L. was on the phone with her mother. So while the paraprofessional was in the office with the students, Ms. Austin contacted Ms. Raulerson, the principal at Stillwell, and notified her there might be a problem so that someone could look at the hallway video and find out if anything happened.

26. Ms. Austin knew that J.L. was a student who needed to be escorted. She was always brought to the nurse's office by an adult. On this occasion, there was no adult.

27. Jennifer Raulerson was the principal at Stillwell during the 2017-2018 school year. She is now the executive director for middle schools in Duval County.

28. Ms. Raulerson testified that J.L.'s father came to the school immediately after J.L.'s telephone call home, and started asking questions. Because of the nature of his questions, consistent with school protocols, Ms. Raulerson contacted Stillwell's school resource officer (SRO), Officer Tuten, as well as Mr. Messick and Ms. Hodges, who was the dean of students, to discuss with J.L.'s father what needed to be done to investigate what actually happened.³

29. The following morning, Ms. Raulerson, Ms. Hodges, and Mr. Messick spoke to J.L., T.B., and M.N., another student in the hallway, about what happened the day before. Based on their answers, Ms. Raulerson gave Ms. Hodges a basic timeframe, and asked her to check the cameras to see if she saw anything that would indicate that something happened involving J.L. and T.B. Ms. Hodges testified that a person can type in a date and time on the computer and look at a specific timeframe on the video, which is what she did. Once she viewed the video and realized how long a student had been out of the classroom, she went to Ms. Raulerson and they looked at the video again. Mr. Messick also watched the video with them.

30. Administrators at the school could access the surveillance video on their computers. The surveillance video software has dates and times from which you can retrieve a time period to watch. However, when you download

³ Although they were under subpoena, neither J.L. nor J.L.'s father appeared to testify at hearing. Any statements attributed to them cannot support a finding of fact for the truth of the matter asserted. § 120.57(1)(c), Fla. Stat. Statements by J.L. that are included in this Recommended Order are not intended to establish the truth of her statements, but rather, to explain why teachers and administrators took the actions they did in response to the situation.

a section of the surveillance video, the downloaded portion does not include the timestamp. When Ms. Raulerson viewed the surveillance video on the computer screen, she could see the time stamp. While the video in evidence as Petitioner's Exhibit 17E does not contain the time stamp, Ms. Raulerson credibly testified that it is the same video she and the others viewed to determine whether J.L. and T.B. were out of the classroom and how long they were out of the classroom.

31. Petitioner's Exhibit 17E is a type of evidence commonly relied upon by reasonably prudent persons in the conduct of their responsibilities as a school administrator. There is no evidence that the tape itself has been altered, edited, or tampered with in any way.

32. The lack of a time stamp is not all that important. What is important is not so much the time of day when J.L. and T.B. were absent from Respondent's classroom, but the length of time that they were absent.⁴

33. Ms. Velez admits that she allowed both students to leave her classroom on January 11. She simply disputes how long J.L. was gone.

34. The surveillance video is 39 minutes and 53 seconds long. The times given in the summary of the video activity below are based on the times recorded on the video, as opposed to the time of day. A comparison of those timeframes with the timeline made by Ms. Austin and Mr. Messick shows that the timelines are essentially the same. The video shows the following:

⁴ Respondent claims she is prejudiced by the admission of the video, because she was not able to view it with the time-stamps to verify that it was, in fact, the video for January 11, 2018. It is noted that Respondent initiated no discovery in this case. Petitioner filed an exhibit list that included a reference to a video as early as July 24, 2020, some three weeks before hearing. Moreover, the Order of Pre-Hearing Instructions specifically requires not only a list of all exhibits to be offered at hearing, but also any objections to those exhibits and the grounds for each objection. Respondent did not note any objection in the Second Amended Joint Pre-Hearing Statement to the admission of any of the videos admitted as Petitioner's Exhibit 17.

35. At eight minutes, 17 seconds, J.L. leaves Ms. Velez's classroom and heads down toward the girls' bathroom at the end of the hall.⁵ She is wearing an over-sized jacket, but is not wearing a vest or carrying a clipboard. At nine minutes, 15 seconds, she comes out of the girls' bathroom and speaks to an adult in the hallway, and then heads back to the bathroom.

36. At the 13-minute, 4-second mark, T.B. walks down the hall from Ms. Velez's classroom and, curiously, walks over toward the girls' bathroom before going over to the boys' bathroom. At 14 minutes, 39 seconds, T.B. comes out of the boys' bathroom and walks over toward the girls' bathroom a second time. After approximately ten seconds, he exits the area near the girls' bathroom and heads back to the boys' bathroom.

37. At approximately 15 minutes into the video, and almost seven minutes after leaving Ms. Velez's classroom, J.L. comes out of the girls' bathroom, peers down the hallway in both directions, and goes over to the boys' bathroom. At this point, she is still wearing her jacket.

38. At approximately 18 minutes, 16 seconds into the video, a second male student, later identified as M.N., walks down the hall. M.N. is not in Ms. Velez's class during this class period. He also goes toward the girls' bathroom first, and then stands in the hallway outside the boys' bathroom. After approximately 30 seconds, he walks down the hall and back, before going toward the boys' bathroom and out of sight at 19 minutes and 40 seconds.

39. At 20 minutes, 16 seconds into the video, other students start lining up in the hallway. Approximately four classes line up in the hallway, with no one coming out of the boys' bathroom. At approximately 29 minutes,

⁵ Respondent established at hearing that one cannot actually see students enter and exit the bathrooms from the surveillance video. The sight line for the video stops just short of the doors to the two bathrooms. However, the only other alternative to going in the bathrooms would be for students to exit the SLA unit through the doors near the bathrooms. If that were the case, J.L. would be subject to harm as well, given that the doors lead to the rest of the school and the bus loading zone.

26 seconds, girls in line outside the bathroom are seen looking toward the boys' bathroom and appear to be laughing.

40. J.L. comes out of the boys' bathroom at the 29-minute, 53-second mark, followed by T.B. J.L. is not wearing her jacket, and her belt is undone. T.B. throws J.L.'s jacket on the floor and walks down the hallway with his hands up in the air. Both J.L. and T.B. walk down the hall toward Ms. Velez's room, and then turn around and return to their respective bathrooms. At the 31-minute, 53-second mark, J.L. comes out of the bathroom with her shirt tucked in and her belt fastened. She is still not wearing her jacket, a small portion of which can be seen on the floor of the hallway. She does not pick it up, but stays in the hallway until T.B. comes out of the bathroom, then both go down the hall toward Ms. Velez's class, with T.B. running and J.L. walking. J.L. re-enters Ms. Velez's classroom at 32 minutes, 21 seconds into the video. Finally, at 32 minutes, 30 seconds, M.N. comes out of the boys' room, picks up J.L.'s jacket and heads down the hall.

41. Based on the surveillance video, J.L. was out of the classroom for slightly over 24 minutes. T.B. was absent from the classroom for over 18 minutes. Ms. Velez is never seen in the hallway.

42. There is no admissible evidence to demonstrate what actually occurred during the time that J.L. appeared to be in the boys' restroom. Regardless of what actually happened, no female student should be in the boys' bathroom, and a female student already identified as needing increased supervision should not be allowed to be unsupervised outside of her classroom at all, much less for such a lengthy period of time. The potential for harm was more than foreseeable, it was inevitable.

43. Ms. Velez did not go in the hallway or send Ms. Kirkland, the paraprofessional present in her classroom that day, to check on J.L. or T.B. She did not call the SRO, the front office, or Mr. Messick to ask for assistance in locating either child. She also did not contact Ms. Raulerson, Mr. Messick, or J.L.'s parents after T.B. told her that J.L. had been in the boys' restroom.

She testified that, while J.L. certainly should not be in the boys' restroom, there was nothing that led her to believe or suspect that there could be neglect or abuse.

44. Ms. Velez acknowledged that she allowed J.L. to go to the bathroom unsupervised, and stated that she was training J.L. to go to the bathroom by herself. If that was the case, doing so was directly contrary to Mr. Messick's email of August 22, 2017, and to the requirements of J.L.'s IEP.

45. Ms. Velez had approximately 18 students in her classroom. Her focus, according to her, was on providing instruction to the students in her class. She denied losing track of time, but stated that once the students were engaged, she took her time with the lesson, which "led me to not noticing what time it was as normally as I should," and she "possibly got distracted." She did not take any responsibility for her actions. Instead, she blamed the situation on the fact that, at the time of the incident, she did not have a full-time paraprofessional assigned to her classroom. While the paraprofessional position for her class was not filled at the time of this incident, Ms. Kirkland traveled with the class and was present in Ms. Velez's class when J.L. was allowed to leave the classroom.

46. Ms. Velez also appeared to minimize the importance of providing increased supervision for J.L., and claimed that she was training her to go to the bathroom by herself. Yet, she described the class as a whole as one that needed "eyes on them" at all times. Further, J.L.'s parents clearly felt the increased supervision was crucial, and called early in the school year to make sure that staff knew J.L. was not to be left alone. Ms. Velez gave no explanation as to why she would "train" J.L. to leave the room unsupervised (and one wonders what training could be taking place, if the child is allowed to go alone outside the classroom), when she knew that to do so was clearly contrary to J.L.'s parents' wishes.

47. On January 22, 2018, the Duval County School District (the District) began an investigation into the incident concerning J.L. that occurred on

January 11, 2018. During the District investigation, Ms. Raulerson notified the Department of Children and Families (DCF) and law enforcement of the incident. Both entities conducted investigations. The results of those investigations are not part of this record.

48. On March 16, 2018, the District reprimanded Respondent and suspended her for 30 days for failing to provide adequate supervision of her students. The School Board's approval of the suspension and the basis for it was reported in the press.

CONCLUSIONS OF LAW

49. The Division has jurisdiction over the parties and the subject matter of this case pursuant to sections 120.569 and 120.57(1).

50. There is no dispute that Respondent is substantially affected by Petitioner's intention to discipline her educator's certificate.

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

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

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

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and

lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

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

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

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

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

(a) Denial of an application for a teaching certificate or for an administrative or supervisory endorsement on a teaching certificate. The denial may provide that the applicant may not reapply for certification, and that the department may refuse

to consider that applicant's application, for a specified period of time or permanently.

(b) Revocation or suspension of a certificate.

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

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

* * *

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

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

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

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

55. Charges in a disciplinary proceeding must be strictly construed, with any ambiguity construed in favor of the licensee. *Elmariah v. Dep't of Prof'l Reg.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); *Taylor v. Dep't of Prof'l Reg.*,

534 So. 2d 782, 784 (Fla. 1st DCA 1988). Disciplinary statutes and rules must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden their application. *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 99-100 (Fla. 1st DCA 2008); *Dyer v. Dep't of Ins. & Treas.*, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

56. Count 1 of the Administrative Complaint charges Respondent with a violation of section 1012.795(1)(g), which authorizes discipline when, upon investigation, the certificate holder has been found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of a school board.

57. Petitioner did not prove Count 1 by clear and convincing evidence. Petitioner has been teaching for 20 years. The School District suspended her license for 30 days, but no evidence was presented to indicate that she is not teaching in the district now, and no evidence was presented to indicate that administrators in the School District, then or now, view Ms. Velez as being any less effective in the classroom. It is unknown how effective Respondent was perceived to be at the time of this incident, much less how that level of effectiveness has changed, if any. Petitioner acknowledges in its Proposed Recommended Order that no direct testimony regarding serious reduction of effectiveness was presented at hearing, but argues that the violation can be shown based on the nature of the misconduct. The examples given are cases involving lying under oath, resisting arrest, and commotion in class caused by an intoxicated student. While there may be instances where an inference is enough, there is simply not enough evidence upon which to find that her effectiveness has been seriously reduced.

58. Count 2 of the Administrative Complaint charges Respondent with violating section 1012.795(1)(j), which authorizes discipline when a certificateholder has violated the Principles of Professional Conduct for the Education Profession prescribed by the State Board of Education rules. This count cannot constitute an independent violation, but rather, is dependent

upon a corresponding violation of the rules constituting the Principals of Professional Conduct. For the reasons expressed with respect to Count 3, this Count has been proven by clear and convincing evidence.

59. Count 3 of the Administrative Complaint charges Respondent with violating rule 6A-10.081(2)(a)1., which, at the time of the conduct at issue, provided:

(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.

60. Petitioner has proven Count 3 by clear and convincing evidence. Respondent allowed J.L. to be out of her classroom, alone, when both the IEP and the August email from Mr. Messick clearly indicate that she is not to be left alone, and that increased supervision is required to insure her safety. Under no circumstances does "increased supervision" include being left to her own devices for 24 minutes of a class period.

61. Moreover, the evidence is clear that, once Respondent allowed J.L. to leave her classroom, she did nothing to check on her whereabouts at any time during the 24 minutes that she was absent from the classroom. Even after learning that she had spent at least part of that time in the boys' bathroom, she did nothing to find out what happened or to report the incident to administration. Respondent also allowed T.B. to be out of the classroom when she knew that J.L. was already unsupervised outside the classroom.

62. Florida Administrative Code Rule 6B-11.007 provides the range of penalties for violations of the Education Code and rules promulgated thereto. For a violation of rule 6A-10.081(2)(a)1., the guidelines permit anything from a reprimand to revocation. Aggravating or mitigating factors listed in rule 6B-11.007(3) that can be considered include the severity of the offense; the danger to the public; the respondent's previous disciplinary history; the length of time the educator has practiced and his or her contribution as an educator; the actual damage, physical or otherwise, caused by the violation; any effort at rehabilitation; and any attempts by the educator to stop the violation or refusal to correct or stop the violation. In this case, the offense is a serious violation of school protocols, a specific directive related to J.L., and J.L.'s IEP, all of which were designed to keep this very vulnerable student safe. Failure to abide by the safeguards in place put this child in a position where significant harm could take place, yet Respondent made no effort to use the resources available to her. T.B.'s absence from the classroom at the same time for almost as long is also concerning, and raises the probability that either or both children could be harmed in the absence of supervision. This is especially so where, as here, both children had cognitive delays that required constant supervision. On the other hand, Respondent has been teaching for 20 years with no discipline. Respondent presented no evidence regarding her effectiveness as a teacher or her contribution to the teaching profession, other than the length of her teaching career.

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) and rule 6A-10.081(2)(a)1. It is further recommended that Respondent 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.

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



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
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this 29th day of October, 2020.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.