

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 20-1335TTS

KENNETH W. MILLER,

Respondent.

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RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings ("DOAH") for final hearing on September 14, 2020, by Zoom conference.

APPEARANCES

For Petitioner: Andrew Carrabis, Esquire  
Broward County School Board  
600 Southeast 3rd Avenue, 11th Floor  
Fort Lauderdale, Florida 33301

For Respondent: Melissa C. Mihok, Esquire  
Melissa C. Mihok, P.A.  
201 East Pine Street, Suite 445  
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner to suspend Respondent's employment as a teacher without pay for one day.

PRELIMINARY STATEMENT

By letters dated January 9 and February 6, 2020, Petitioner, Broward County School Board ("School Board"), notified Respondent, Kenneth W. Miller ("Respondent"), of the School Board's intent to suspend his employment without pay. On January 7, 2020, Respondent timely requested an administrative hearing. On March 3, 2020, at its scheduled meeting, the School Board took action to suspend Respondent's employment as a teacher without pay for one day. On March 10, 2020, the School Board referred the matter to DOAH to assign an Administrative Law Judge to conduct the final hearing.

The Amended Administrative Complaint contains certain factual allegations, and based on those factual allegations, the School Board charged Respondent with misconduct in office, incompetency, inefficiency, and violation of School Board policies 2130 and 4008.

The final hearing was initially set for April 24, 2020. On March 17, 2020, the parties filed a joint motion for continuance and Petitioner filed a motion to amend the Administrative Complaint. On March 18, 2020, the undersigned granted the motions and reset the final hearing for June 2 and 3, 2020. On May 7, 2020, the School Board filed an unopposed motion for continuance because of the COVID-19 pandemic. On May 8, 2020, the undersigned granted the motion and reset the final hearing for August 11 and 12, 2020. On July 22, 2020, the parties filed another motion for continuance because of the COVID-19 pandemic. On July 24, 2020, the undersigned granted the motion and reset the final hearing for September 14 and 15, 2020.

The final hearing was conducted as scheduled on September 14, 2020, with both parties present. At the hearing, the School Board presented the testimony of I.B., M.K., M.G., Calvin Golson, Annika Williams-Brown,

Debra Clark, and Sabrina Smith. The School Board's Exhibits 1 through 16 were received into evidence based on the stipulation of the parties. The School Board's Exhibit 17 was also received into evidence. Respondent testified on his own behalf. Respondent's Exhibits 1 and 2 were received into evidence based on the stipulation of the parties.

The one-volume final hearing Transcript was filed at DOAH on September 29, 2020. On October 9, 2020, the School Board filed an unopposed motion to extend the parties' deadline until October 26, 2020, to file proposed recommended orders. On October 9, 2020, the undersigned entered an Order granting the motion.

The parties timely filed proposed recommended orders on October 26, 2020. On October 27, 2020, the School Board unilaterally filed an amended proposed recommended order. Although the School Board did not file a motion requesting that the undersigned consider its amended proposed recommended order, which was filed one day late, the undersigned has nevertheless considered the amended proposed recommended order in the preparation of this Recommended Order because there is no prejudice to Respondent. The undersigned also considered Respondent's Proposed Recommended Order in the preparation of this Recommended Order. On September 4, 2020, prior to the hearing, the parties filed their Joint Pre-Hearing Stipulation, in which they stipulated to certain facts. These facts have been incorporated into this Recommended Order as indicated below.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged violations.

## FINDINGS OF FACT

1. The School Board is a duly-constituted school board charged with the duty to operate, control, and supervise the public schools in Broward County.

2. The School Board hired Respondent on September 1, 1981. At all times material hereto, Respondent has been employed by the School Board as a middle school social science teacher and department head at Whiddon-Rogers Education Center ("Whiddon-Rogers").

3. At all times material to this case, Respondent's employment with the School Board has been governed by Florida law and the School Board's policies.

4. The conduct giving rise to the School Board's proposed one-day suspension of Respondent occurred on October 1, 2019, during the 2019-2020 school year.

5. On the morning of October 1, 2019, M.G., an eighth grade male student at Whiddon-Rogers, received a telephone call regarding some family members who had died that morning. Due to the deaths in his family, M.G. was upset and in a "bad mood" throughout the morning and later that day when he arrived in Respondent's fourth period social studies class.

6. During Respondent's fourth period class, M.G. did not want to be disturbed. He had a "hoodie over his head," his head down on his desk, and he was not doing any work.

7. M.G. was often picked on in class by other students. On this particular occasion in Respondent's fourth period class, M.G. was being picked on by other students as he laid his head down on his desk.

8. At some point, M.G. picked his head up from his desk and made a verbal threat to other students that he was going to shoot up the school.

9. Respondent did not hear M.G. make the threat. One of the other students that heard M.G.'s threat went to Respondent during class and told him M.G. had threatened to shoot up the school.

10. Respondent did not report M.G.'s threat to school administration.

11. Respondent did not consider M.G.'s comment to be a dangerous threat. Respondent did not want to embarrass M.G. and told him during his fourth period class on October 1, 2019, that he could not say things like that. M.G., who was angry, did not respond to Respondent and walked out of the classroom. Respondent instructed M.G. to return to the classroom, but M.G. ignored him.

12. On October 2, 2019, M.G. did not attend school.

13. On the morning of October 3, 2019, Assistant Principal Sabrina Smith received a text message from another teacher at Whiddon-Rodgers, N'Kenge Rawls, notifying her of M.G.'s threat on October 1, 2019, to shoot up the school.

14. Ms. Smith notified the other assistant principals of the threat and assembled the mandatory members of the Behavioral Threat Assessment ("BTA") team to collaboratively analyze available data, determine the level of risk, and develop appropriate interventions.

15. As part of the threat assessment, Ms. Smith spoke to M.G. on October 3, 2019, who admitted he had threatened to shoot up the school. Ms. Smith also spoke to Respondent, who admitted he did not report M.G.'s threat to administration on October 1, 2019. Respondent admitted to Ms. Smith that he should have reported M.G.'s threat and that he made a mistake in not reporting the threat.

16. Based on the behavioral threat assessment, the BTA team determined M.G.'s risk level to be "Medium/Serious Substantive." A "Medium/Serious Substantive" risk level means that the student "does not appear to pose a threat of violence at this time but exhibits behaviors that indicate a continuing intent to harm and/or potential for future violence."

17. By all accounts, Respondent is a good teacher and well respected by his colleagues as evidenced by his team leader role at Whiddon-Rodgers. However, on this particular occasion, Respondent used poor judgment and erred in not reporting M.G.'s threat to shoot up the school on October 1, 2019.

18. The persuasive and credible evidence adduced at hearing establishes that Respondent failed to report M.G.'s threat to shoot up the school, which constitutes misconduct in office in violation of Florida Administrative Code Rule 6A-5.056. By failing to report M.G.'s threat to shoot up the school, Respondent violated rule 6A-10.081(2)(a)1., by failing to make reasonable effort to protect the students from conditions harmful to learning and/or to the students' mental and/or physical health and/or safety. Respondent's conduct also constitutes "[i]ncompetency" and "[i]nefficiency," in violation of rule 6A-5.056(3) and (3)(a)1., by failing to discharge the duty to report such a threat as prescribed by law and "[i]nefficiency" in violation of rule 6A-5.056(3)(a)3., by failing to communicate appropriately with and relate to administrators. Respondent's conduct also violates School Board Policy 2130, which requires School Board employees "to report to school administration any expressed threat(s) or behavior(s) that may represent a threat to the community, school, or staff," and School Board Policy 4008, which requires Respondent to comply with the "Principles of Professional Conduct of the Education Profession in Florida," and "all rules and regulations that may be prescribed by the State Board and by the School Board."

19. Respondent has only received prior discipline on one occasion. On September 19, 2007, Respondent received a written reprimand for inappropriate discipline of a student.

#### CONCLUSIONS OF LAW

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

21. Respondent is an instructional employee, as that term is defined in section 1012.01(2), Florida Statutes. The School Board has the authority to suspend instructional employees pursuant to sections 1012.33(1)(a) and 1012.33(6)(a).

22. The School Board has the burden of proving, by a preponderance of the evidence, that Respondent committed the violations alleged in the Amended Administrative Complaint, and that such violations constitute "just cause" for a one-day suspension. §§ 1012.33(1)(a) and (6)(a), Fla. Stat.; *Dileo v. Sch. Bd. of Dade Cty.*, 569 So. 2d 883, 884 (Fla. 3rd DCA 1990).

23. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000). The preponderance of the evidence standard is less stringent than the standard of clear and convincing evidence applicable to loss of a license or certification. *Cisneros v. Sch. Bd. of Miami-Dade Cty.*, 990 So. 2d 1179 (Fla. 3rd DCA 2008).

24. Whether Respondent committed the charged offenses is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation. *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985); *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995).

25. Sections 1012.33(1)(a) and (6)(a) provide, in pertinent part, that instructional staff may be suspended during the term of their employment contract only for "just cause." §§ 1012.33(1)(a) and (6)(a), Fla. Stat. "Just cause" is defined in section 1012.33(1)(a) to include "misconduct in office" and "incompetency."

26. Section 1001.02(1), Florida Statutes, grants the State Board of Education authority to adopt rules pursuant to sections 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.

27. Consistent with this rulemaking authority, the State Board of Education has defined "misconduct in office" in rule 6A-5.056(2), which provides:

(2) "Misconduct in Office" means one or more of the following:

- (a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6A-10.080, F.A.C.;
- (b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;
- (c) A violation of the adopted school board rules;
- (d) Behavior that disrupts the student's learning environment; or
- (e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

28. Rule 6A-10.080, titled "Code of Ethics of the Education Profession in Florida," was repealed, effective March 23, 2016, and reenacted in rule 6A-10.081(1)(a)-(c). Rule 6A-10.081(1)(a)-(c) provides:

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



community, the educator strives to achieve and sustain the highest degree of ethical conduct.

29. While rule 6A-5.056(2)(a) still provides that violation of the Code of Ethics, "as adopted in [r]ule 6A-10.080," constitutes "misconduct," it has been frequently noted that the precepts set forth in the "Code of Ethics" are "so general and so obviously aspirational as to be of little practical use in defining normative behavior." *Broward Cty. Sch. Bd. v. Beckham*, Case No. 19-4589TTS (Fla. DOAH Mar. 9, 2020; BCSB May 1, 2020); *Miami-Dade Cty. Sch. Bd. v. Lantz*, Case No. 12-3970 (Fla. DOAH July 29, 2014).

30. Rule 6A-5.056(2)(b) incorporates by reference rule 6A-10.081, which is titled "Principles of Professional Conduct for the Education Profession in Florida." Rule 6A-10.081(2)(a) provides, in pertinent part:

(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.

31. Consistent with its rulemaking authority, the State Board of Education has defined "incompetency" in rule 6A-5.056(3), which provides, in pertinent part:

(3) "Incompetency" means the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity.

32. Consistent with its rulemaking authority, the State Board of Education has defined "inefficiency" in rule 6A-5.056(3)(a), which provides, in pertinent part:

(a) "Inefficiency" means one or more of the following:

1. Failure to perform duties prescribed by law;

2. Failure to communicate appropriately with and relate to students.

3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents.

33. School Board Policy 2130 is a "rule" within the meaning of rule 6A-5.056(2)(c). School Board Policy 2130 provides, in pertinent part:

**THREAT ASSESSMENT POLICY**

The School Board of Broward County (SBBC), Florida is committed to protecting its students, employees, and members of the community. It is essential that Districtwide violence prevention be in place to foster a learning environment that promotes a culture of safety, respect, trust, and social/emotional support, while also protecting students and staff from conduct which poses an actual or perceived threat to self or others. The threat assessment policy shall be interpreted and applied consistently with all applicable state and federal laws, and The Board's collective-bargaining agreements. The policy was developed in accordance with the legislation enacted by the State of Florida (Marjory Stoneman Douglas High School Public Safety Act, SB 7026), established research, and recognized standards of practice regarding threat assessment and management in school settings.

\* \* \*

**Section III: ROLES AND RESPONSIBILITIES**

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L. All SBBC employees, volunteers, and contractors are required to report to school administration any expressed threat(s) or behavior(s) that may represent a threat to the community, school, or self.

34. School Board Policy 4008 is a "rule" within the meaning of rule 6A-5.056(2)(c). School Board Policy 4008 provides, in pertinent part:

**B. DUTIES OF INSTRUCTIONAL PERSONNEL**

The members of instructional staff shall perform the following functions:

1. Comply with the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida.

\* \* \*

8. Conform to all rules and regulations that may be prescribed by the State Board and by the School Board.

35. Turning to the instant case, the School Board proved, by a preponderance of the evidence, that Respondent is guilty of misconduct in office in violation of rule 6A-5.056(2). As detailed above, by failing to report M.G.'s threat on October 1, 2019, to shoot up the school, Respondent failed to make reasonable effort to protect students from conditions harmful to learning and/or to the students' mental and/or physical health and/or safety. Respondent's conduct also constitutes "[i]ncompetency" and "[i]nefficiency," in violation of rule 6A-5.056(3) and (3)(a)1., by failing to discharge the duty to report such a threat as prescribed by law and "[i]nefficiency" in violation of rule 6A-5.056(3)(a)3., by failing to communicate appropriately with and relate to administrators. Respondent's conduct also violates School Board Policy 2130, which requires School Board employees "to report to school administration any expressed threat(s) or behavior(s) that may represent a threat to the community, school, or staff," and School Board Policy 4008, which requires Respondent to comply with the "Principles of Professional Conduct of the Education Profession in Florida," and "all rules and regulations that may be prescribed by the State Board and by the School Board."

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Broward County School Board enter a final order upholding the one-day suspension of Respondent's employment without pay.

DONE AND ENTERED this 10th day of November, 2020, in Tallahassee, Leon County, Florida.



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DARREN A. SCHWARTZ  
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](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of November, 2020.

COPIES FURNISHED:

Andrew Carrabis, Esquire  
Broward County School Board  
600 Southeast 3rd Avenue, 11th Floor  
Fort Lauderdale, Florida 33301  
(eServed)

Melissa C. Mihok, Esquire  
Melissa C. Mihok, P.A.  
201 East Pine Street, Suite 445  
Orlando, Florida 32801  
(eServed)

Robert W. Runcie, Superintendent  
Broward County Public Schools  
600 Southeast 3rd Avenue  
Fort Lauderdale, Florida 33301

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

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

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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