

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD CORCORAN, AS COMMISSIONER
OF EDUCATION,

Petitioner,

vs.

Case No. 20-4420PL

DIANE N. TIRADO,

Respondent.

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RECOMMENDED ORDER

A hearing was held in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2020),¹ before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), by Zoom Conference, on February 2 and 3, 2021.

APPEARANCES

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

For Respondent: Mark S. Wilensky, Esquire
 Dubiner and Wilensky, LLC
 1200 Corporate Way, Suite 200
 Wellington, Florida 33414-8594

¹ All references to chapter 120 are to the 2020 version.

STATEMENT OF THE ISSUES

Whether Respondent violated the Florida Statutes and Florida Administrative Code rules, as charged in the Amended Administrative Complaint, and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On or about August 27, 2020, Petitioner, Richard Corcoran, as Commissioner of Education, issued an Amended Administrative Complaint ("Complaint") charging Respondent, Diane N. Tirado, with having violated Florida Administrative Code Rule 6A-10.081, and proposing to sanction Respondent's educator's certificate, pursuant to sections 1012.795 and 1012.796, Florida Statutes (2018).² Respondent previously had filed an election of rights requesting a formal administrative hearing.³ The final hearing originally was scheduled for December 4, 2020, but pursuant to motion, was continued to February 2 and 3, 2021.

The final hearing was held on February 2 and 3, 2021. Petitioner presented the testimony of Aaron Clements; Jermaine Jones; and students E.J., J.P., G.C., J.K., and A.S. Petitioner's Exhibit Nos. 1, 3, 4, 10 through 14, 14A, and 15 through 21 were admitted into evidence over objection.

² Respondent's conduct that is alleged to violate rule 6A-10.081 took place in August 2018. The 2018 version of chapter 1012 was in effect at the time of the alleged conduct, and, therefore, applies to this proceeding. *See* ch. 2018-150, §§ 12, 15, at 16-18, 22, Laws of Fla. The version of rule 6A-10.081 adopted on March 23, 2016, was in effect at the time of the alleged violations, and, therefore, applies to this proceeding. *See Orasan v. Ag. for Health Care Admin.*, 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996)(law in effect at time of alleged violations applies in disciplinary proceedings).

³ Petitioner previously filed an administrative complaint against Respondent in Case No. 20-0998PL, and Respondent filed an Election of Rights requesting an administrative hearing. That case was dismissed without prejudice for Petitioner to request to reopen the case at DOAH. On October 2, 2020, Petitioner filed an Unopposed Motion to Re-Open file, which was granted, giving rise to this proceeding.

Respondent testified on her own behalf and presented the testimony of student K.K. Respondent's Exhibit No. 9 was admitted into evidence without objection.

The three-volume Transcript was filed at DOAH on March 2, 2021. Pursuant to the parties' agreement, the deadline for filing proposed recommended orders was extended to March 22, 2021. The parties timely filed their Proposed Recommended Orders ("PROs") on March 22, 2021. Both PROs have been duly considered in preparing this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner, the Commissioner of Education, is responsible for determining whether there is probable cause to warrant disciplinary action against an educator's certificate and, if probable cause is found, for filing and prosecuting an administrative complaint pursuant to chapter 120.

2. Respondent holds Florida Educator's Certificate No. 803275, valid through June 30, 2021, covering the areas of elementary education, exceptional student education, middle grades integrated curriculum, and social science.

3. At the time of the final hearing in this proceeding, Respondent had taught for approximately 17 years.

The Complaint

4. The Complaint alleges that Respondent spoke ill of student E.J.'s work on an assignment in front of the whole class, including, but not limited to, calling it pathetic. As a result, E.J. was embarrassed.

5. Additionally, the Complaint alleges that Respondent spoke ill of student A.S.'s work on an assignment in front of the whole class, including, but not limited to, calling it pathetic. As a result, A.S. was embarrassed.

6. The Complaint also alleges that Respondent criticized student J.P.'s work on an assignment, including, but not limited to, saying he had not put any work into it.

7. As a result of this alleged conduct, the Complaint charges Respondent with having violated section 1012.795(1)(j), and rules 6A-10.081(2)(a)1. and 6A-10.081(2)(a)5.

Evidence Adduced at the Final Hearing

8. Respondent began teaching in the St. Lucie County School District ("District") on August 1, 2016.

9. At the time of Respondent's conduct that is alleged to violate section 1012.795 and rule 6A-10.081, Respondent was employed as an eighth grade social studies teacher at West Gate K-8 School ("West Gate"), in the District.

10. The 2018-2019 school year for the District began on August 13, 2018.

11. September 14, 2018, was Respondent's last day of employment with the District.

12. The alleged conduct giving rise to this proceeding occurred at some point between August 13, 2018, and September 14, 2018. On or about September 14, 2018, the District initiated an investigation into Respondent's conduct while she had been employed at West Gate.

13. E.J. was a student in Respondent's eighth grade history class. Respondent assigned the students to complete a history project. After E.J. turned in his project, Respondent called him up to her desk and told him, in the front of the class, that his work on the project was "lazy" and "pathetic." Other students in the class saw Respondent's conduct and heard her comments to E.J.

14. E.J. testified, credibly and persuasively, that he was embarrassed and hurt by Respondent's comments, and that he went back to his desk in tears.

15. The credible evidence establishes that after seeing E.J.'s reaction to her comments, Respondent called E.J. outside of the classroom and apologized.

16. Respondent testified, credibly, that she felt "terrible" about making E.J. cry, and that she had made the comments because she was frustrated with the quality of the students' work on the project.

17. E.J.'s father, Jermaine Jones, who had picked him up from school on the day of the incident, confirmed that E.J. was upset by Respondent's comments on his project.

18. Jones immediately set up a meeting with Assistant Principal Guzman and Respondent for the following day. At that meeting, Respondent apologized to E.J.'s parents and said she was having a stressful day when she made the comments to E.J.

19. According to Jones, the incident made E.J.—who normally is quiet—further withdrawn, and he became, in Jones's words, "a little depressed." According to Jones, following the incident, E.J. did not want to go to Respondent's class.

20. Other student witnesses testified at the final hearing, credibly and consistently, that they saw and heard Respondent's comments directed at E.J., and that E.J. was upset by her comments and started to cry.

21. Another student, J.P., testified that he had been unable to complete the project for Respondent's class because his grandfather was ill and had been hospitalized, and that he and his family had been spending time at the hospital. J.P. took a note from his mother, to Respondent, on the day the project was due, explaining the reason why J.P. had been unable to complete his project. J.P. testified, credibly, that Respondent told him, in front of the class, that she really did not care about the note, and if he did not turn in the completed project by the following day, he would receive a grade of "zero." J.P. credibly testified that other students in the class heard Respondent's comments to him, and that he was "very shocked" and felt "very embarrassed." J.P. did not turn in a project.

22. Student A.S. testified, credibly, that Respondent told him that his work on the project was unacceptable and "pathetic." Respondent made these

comments in front of the entire class. A.S. testified, credibly, that he felt "very embarrassed and upset." He testified, credibly, that Respondent did not apologize to him.

23. Respondent testified on her own behalf. She acknowledged calling E.J.'s work "lazy" and "pathetic," but testified that she had not intended to hurt his feelings, and when she realized that she had, she "felt terrible about it." She acknowledged that she has "a deep voice, and I come off harsher than I mean to."

24. She called E.J. outside to explain that she had not intended to hurt his feelings, and there would be other opportunities to make up the bad grade he received on the project. She testified that as a result of their talk, E.J. calmed down, and that she did not have any further issues with him in class.

25. She confirmed that on the day following the incident with E.J., she met with E.J.'s parents to discuss the incident. She testified that the meeting was "civil," and that she left the meeting feeling like "it was taken care of."

26. Regarding the incident with J.P., Respondent testified that the students had two weeks in which to complete the project, and that when J.P. approached her with the note regarding his grandfather's illness, she told him to turn in, the following day, what he had completed to that point. She confirmed that J.P. did not turn in a project. She also testified that she did not hear from J.P.'s mother regarding the project.

27. Regarding student A.S., Respondent testified that she did not call his work "pathetic," and that, given E.J.'s reaction, she would not have used that word again.⁴

28. Respondent also presented the testimony of K.K., who also had been a

⁴ Respondent acknowledged that the alleged incidents with E.J., J.P., and A.S. involved the same project, and that E.J. and A.S. had turned the project in on the same day. Thus, the undersigned questions whether Respondent would have had sufficient time to reflect on the effect that the word "pathetic" had on E.J., such that she would not have used that word in speaking with A.S. on the same day.

student in Respondent's eighth grade history class in the 2018-2019 school year. K.K. testified that Respondent discussed E.J.'s paper with the class because it was a good paper, and that she did not see anyone cry in Respondent's class. She also testified that Respondent did not speak in negative terms about anyone's project in front of the class.

29. However, K.K.'s testimony and written statement are directly contradicted by the testimony of four other students, as well as by E.J.'s father and Respondent herself, who admitted having called E.J.'s work on the project "lazy" and "pathetic" in front of the class. Accordingly, K.K.'s testimony and statement are not deemed credible.

30. Respondent has been a teacher for 17 years. She testified that her educator's certificate has never been subjected to discipline, and no evidence was presented showing that disciplinary action has ever been taken against her educator's certificate.

Findings of Ultimate Fact

31. Based on the foregoing, it is determined that Petitioner proved, by clear and convincing evidence, that Respondent engaged in the conduct alleged in the Complaint.

32. Whether particular conduct constitutes a violation of the applicable statutes and rules is a factual question to be decided in the context of the alleged violation. *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995). Whether specific conduct constitutes a deviation from the required standard is an ultimate finding of fact. *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985).

33. Rule 6A-10.081(2)(a)1., of the Principles of Professional Conduct for the Education Profession in Florida, requires a teacher to make reasonable effort to protect a student from conditions harmful to learning and to the student's mental health. It is determined that by disparaging E.J.'s work in front of the entire class—which caused him to suffer distress, withdraw, and avoid going to Respondent's class—Respondent violated this rule.

34. Rule 6A-10.081(2)(a)5., of the Principles of Professional Conduct for the Education Profession in Florida, requires a teacher to avoid intentionally exposing a student to unnecessary embarrassment or disparagement. As found above, Respondent intentionally engaged in conduct that resulted in unnecessary embarrassment to students E.J., J.P., and A.S. Accordingly, it is determined that Respondent violated this rule.

35. By violating the Principles of Professional Conduct for the Education Profession in Florida, Respondent violated section 1012.795(1)(j).

CONCLUSIONS OF LAW

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

37. This is a proceeding to impose disciplinary sanctions on Respondent's educator certificate. Because this disciplinary proceeding is penal in nature, Petitioner is required to prove the allegations in the 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).

38. 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 *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). "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).

39. This proceeding is predicated on the allegations set forth in the Complaint filed with DOAH on October 6, 2020. Due process prohibits Petitioner from taking disciplinary action based on matters not specifically alleged in the charging instrument. *See 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).

40. As set forth above, the Complaint charges Respondent with having violated rules 6A-10.081(2)(a)1. and 6A-10.081(2)(a)5., and, consequently, section 1012.795(1)(j).

41. Section 1012.795(1)(j) states, in pertinent part: "(1) [t]he Education Practices Commission may . . . impose any other penalty provided by law, if the person: . . . (j) [h]as violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules."

42. The Principles of Professional Conduct for the Education Profession in Florida are codified in rule 6A-10.081.

43. Rule 6A-10.081(2)(a) states, in pertinent part:

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 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 safety.

* * *

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

44. For the reasons discussed above, it is concluded that Respondent violated rules 6A-10.081(2)(a)1. and 5., and, accordingly, violated section 1012.795(1)(j).

45. Florida Administrative Code Rule 6B-11.007 establishes the guidelines for determining the appropriate penalty to be imposed on a person who has committed an act for which the Education Practices Commission may impose discipline.⁵

46. Pursuant to rule 6B-11.007(2)(j)1., the penalty for having violated rule 6A-10.081(2)(a)1. ranges from reprimand to revocation of an educator's certificate.

47. Pursuant to rule 6B-11.007(2)(j)5., the penalty for having violated rule 6A-10.081(2)(a)5. ranges from reprimand to revocation of an educator's certificate.

48. Rule 6B-11.007(3) provides for the consideration of aggravating and mitigating factors in determining the appropriate penalty to be imposed. This rule states, in pertinent part:

The Commission may consider the following as aggravating or mitigating factors:

- (a) The severity of the offense;
- (b) The danger to the public;
- (c) The number of repetitions of offenses;
- (d) The length of time since the violation;
- (e) The number of times the educator has been previously disciplined by the Commission;

⁵ The version of rule 6B-11.007 that was adopted on May 29, 2018, was in effect at the time of the violations giving rise to this proceeding, and, therefore, applies to this proceeding.

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

(g) The actual damage, physical or otherwise, caused by the violation;

(h) The deterrent effect of the penalty imposed;

(i) The effect of the penalty upon the educator's livelihood;

* * *

(k) The actual knowledge of the educator pertaining to the violation;

* * *

(m) Attempts by the educator to correct or stop the violation or refusal by the educator to correct or stop the violation;

* * *

(q) Pecuniary benefit or self-gain inuring to the educator;

(r) Degree of physical and mental harm to a student or a child;

49. Based on the foregoing, it is determined that Respondent's offense was severe. She intentionally disparaged students' work in front of the class, causing them to suffer distress and embarrassment, and causing one student to experience lasting negative effects. Although Respondent claims not to have intended to upset or embarrass the students, she is an experienced teacher who knew, or should have known, not to make disparaging comments to students in front of others.

50. However, there are certain mitigating factors that must be considered in determining the penalty to be imposed on Respondent's educator's certificate. Specifically, Respondent's conduct did not pose a danger to the

public, and she did not experience any pecuniary benefit as a result of her actions. Additionally, while she engaged in three discrete acts that violated rule 6A-10.081(2)(a)1. and 5., she did so during the same class period project. No evidence was presented that she subsequently engaged in such conduct.

51. Additionally, the evidence establishes that Respondent has been a certified teacher for 17 years, and no disciplinary action has been taken against her certificate during that period.

52. Based on consideration of the relevant factors in rule 6B-11.007(3), it is concluded that placing Respondent's educator's certificate on probation for one calendar year from the date the final order is entered in this proceeding is an appropriate penalty. This penalty recognizes the seriousness of Respondent's offenses, but takes into account that no disciplinary action previously has been taken against her educator's certificate.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a Final Order placing Respondent's educator's certificate on probation for a period of one year from the date of the Final Order.

DONE AND ENTERED this 23rd day of June, 2021, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
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Filed with the Clerk of the
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this 23rd day of June, 2021.

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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.