STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 20-5135TTS

ANA B. ALVAREZ,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard by Administrative Law Judge ("ALJ") Robert L. Kilbride, of the Division of Administrative Hearings ("DOAH"), on February 26, 2021, by Zoom conference.

APPEARANCES

For Petitioner: Christopher J. La Piano, Esquire
Miami-Dade County School Board
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For Respondent: Mark Herdman, Esquire
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STATEMENT OF THE ISSUE

Whether just cause exists to uphold the 30-day unpaid suspension of Ana B. Alvarez ("Respondent") from the Miami-Dade County School Board ("School Board" or "Petitioner") for her actions outlined in Petitioner's Notice of Specific Charges filed December 17, 2020.

PRELIMINARY STATEMENT

On November 18, 2020, Petitioner took employment action to suspend Respondent for 30 days without pay.

Taking exception to this decision, Respondent requested a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes, and the matter was referred to DOAH to conduct an evidentiary hearing.

On December 17, 2020, Petitioner filed a Notice of Specific Charges, as ordered by the undersigned, outlining the facts against Respondent in more detail.

The final hearing was initially scheduled for January 4, 2021. The undersigned granted a motion to continue and the final hearing was rescheduled for February 26, 2021.

At the final hearing, Petitioner presented the testimony of Principal Tiffany Anderson; Office of Professional Services Director Helen Pina; and students, J.F., S.C., S.J., and I.S. Petitioner's Exhibits 1 through 12 were admitted into evidence.

Respondent testified on her own behalf and offered the testimony of two teachers, Hector Reyes and Melissa Yen. Respondent offered one exhibit, which was admitted into evidence.

The Transcript of the hearing was filed on April 30, 2021. The undersigned granted a Motion for Extension of Time to File Proposed Recommended Orders, and the parties timely filed their respective proposed recommended orders on May 17, 2021.

The proposed recommended orders were reviewed and considered by the undersigned in the preparation of this Recommended Order. All references to statutes, rules, or policies are to those in effect when the action, omission, or conduct occurred.

FINDINGS OF FACT

The undersigned makes the following findings of material and relevant fact:

STIPULATION OF THE PARTIES

1. At all times relevant to this case, Petitioner was a duly constituted School Board charged with the duty to operate, control, and supervise all free public schools within the school district of Miami-Dade County, Florida, pursuant to Article IX, section 4(b) of the Florida Constitution, and section 1012.23, Florida Statutes.

2. At all times material hereto, Respondent was employed pursuant to a professional service contract at Gateway Environmental K-8 Learning Center ("Gateway Elementary"), a public school in Miami-Dade County, Florida.

3. At all times material hereto, Respondent's employment was governed by the collective bargaining agreement ("CBA") between Miami-Dade County Public Schools and the United Teachers of Dade, the policies of the School Board, and Florida law.

FACTS ESTABLISHED AT THE HEARING

4. At the time of these events, Respondent, Alvarez, had been a physical education teacher for approximately 17 years. She had been at Gateway Elementary since 2011.

5. There were several incidents involving Respondent outlined by Petitioner in its Notice of Specific Charges, each of which are addressed below.

November 2018 Incident

6. In paragraph 14 of the Notice of Specific Charges, Petitioner alleges: "On or about November 9, 2018 Respondent pushed a female student while stating, 'get out of my way'." The incident involved student I.S., a young student at Gateway Elementary.

7. As background, when students leave their classrooms to go to physical education classes, they are required to line-up first on the side of the walkway, so the P.E. teacher can take attendance.

8. On November 9, 2018, the students were lined up as usual and Respondent was taking attendance. I.S. testified that the walkway at this location was approximately three to four feet wide, and there were two lines of students from separate classes lined up on either side of the walkway.

9. As Respondent was walking down the lines taking attendance, she brushed up against I.S. who was standing "out a little bit" or slightly outside the line of students.

10. According to I.S., Respondent did not use her hands to push her, but rather Respondent's shoulder brushed against hers as she walked past. The force of the "brushing" did not cause I.S. to lose her balance. As Respondent passed and brushed her, I.S. moved to the side on her own.

11. Respondent had no specific recollection of this incident, but then denied that she would have ever improperly pushed I.S. or any other student. ("No, never happened.")

12. This incident did not involve Respondent shoving or intentionally pushing I.S. in an angry or malicious way. It was a slight to moderate brushing of I.S.'s body by Respondent on a crowded, narrow, and hectic walkway.

13. Later in the class period, I.S., and others who were late, were required by Respondent to sit down on the field because of their tardy behavior. It was I.S.'s belief she was required to sit on or near ants. That upset I.S., and she reported it to the Principal.

14. However, there was no evidence to show that Respondent knowingly or intentionally chose to have I.S. sit in an area with an active ant pile.[1]

15. From these facts and their reasonable inferences, Respondent inadvertently brushed against I.S. on the crowded and hectic walkway. Given the close proximity of the students and the teacher to one another on the walkway, such an encounter would not be unexpected. Respondent did not push I.S. as alleged.

February 2019 Incident

16. In paragraph 15 of the Notice of Specific Charges, the School Board alleges;

> On or about February 11, 2019 a group of female students in Respondent's class were harassed, pushed and hit by several male students. The female students reported this to the Respondent and she took no corrective action and failed to document the incident.

17. Two female students, S.C. and S.J., testified about the incident.

18. According to S.C., the class was on the P.E. field and the boys were bothering the girls. She didn't recall if she said anything to Respondent about the incident and doesn't know if anyone else said anything to Respondent.

19. S.J. also testified the boys were bothering the girls. She testified one boy dropped his pants and acted inappropriately in front of her.

20. She complained to Respondent that the boys were "bothering and hitting" the girls. S.J. did not tell Respondent about the boy dropping his pants in front of her or exposing himself.

21. Respondent called the boys over, told them to stop bothering the girls, and to apologize to the girls for their behavior. The boys said they were sorry and apologized.

[1] Regardless, this part of the incident that day was not alleged or charged in the Notice of Specific Charges and is not being considered.

22. After P.E., at lunch, the boys again began to bother the girls. The girls reported the boys' behavior to the counselor.

23. According to Respondent, this type of general complaint by her young female students was common. In fact, on the P.E. field, the young boys and girls were constantly harassing, teasing, and annoying one another. When she received the complaint from S.C. and S.J., she immediately dealt with the boys by placing them in time-out and making them apologize.

24. Respondent was not told or made aware of any claims that a boy had dropped his pants, nor did she witness that behavior.

25. The school had two mounted video cameras surveilling the P.E. field and shelter. When the Principal was made aware of the allegations from these girls she reviewed the video footage from the cameras. She was not able to confirm any of the conduct or actions complained of by the girls that day.

26. From the facts, and their reasonable inferences, some boys appear to have been bothering and harassing these girls during P.E. That seems consistent with how 4th grade boys often interact with 4th grade girls, particularly outside on a playground.

27. When presented with these complaints from the girls, Respondent promptly acted to have the boys sit in time-out and apologize for their behavior.

28. The complaints did not appear to Respondent to be unusual or so concerning that they needed to be reported to the school administration. The complaints involved normal incidents and interactions that occur most days on an elementary school playground area between young boys and girls. She listened to the complaints and took the corrective actions necessary to deal with the situation.

<u>May 2019 Incident</u>

29. In paragraph 16 of the Notice of Specific Charges, the School Board alleges:

> On or about May 16, 2019 and [sic] female student stood up to remove her jacket and the Respondent angrily grabbed the girl by the arm, squeezed her arm, and directed her to the ground.

30. The female student involved in the incident, M.M., did not testify or offer any evidence to support this allegation.

31. The incident involving M.M. allegedly occurred in the shelter area outside the main building. There are two cameras in the shelter surveilling the area.

32. Students J.F. and M.M. both received F's for conduct on May 16, 2019. Resp. Ex. 1. J.F. testified that M.M. had been standing up. When Respondent told her to sit down, M.M. refused.

33. J.F. testified that Respondent used "a little force" on M.M., "but not hard," to sit her down, directing her to be seated by taking her upper arm bicep. M.M. was not pulled hard or snatched forcefully, she just "moved a little bit" to sit down on the ground of the shelter.

34. Other than telling M.M. to sit down, Alvarez did not use any angry or demeaning language towards M.M. J.F. described Respondent as using a medium tone of voice when dealing with M.M.

35. Upon receiving the complaint that Respondent had grabbed M.M., the Principal reviewed the video footage from the cameras. She was unable to confirm the allegation from the camera videos or that anything problematic had happened that day.

36. On the day of the alleged incident, Hector Reyes was teaching a class in the same shelter area as Respondent. He would have been within 20 to 30 feet of Respondent. He was close enough to Respondent and her class to have heard a commotion. He did not recall hearing or observing any incident between Respondent and M.M. that day.

37. The class continued and M.M. stayed in the class. At the end of P.E. class, the regular classroom teacher, Melissa Yen ("Yen"), came to pick up the

students. Respondent reported to Yen that M.M. refused her instructions to sit down and misbehaved. The conversation happened in front of M.M. M.M. did not protest or complain that Respondent angrily or roughly grabbed her arm.

38. From the facts and their reasonable inferences, Respondent did not angrily grab M.M. or improperly squeeze her arm. M.M. was being non-compliant and disrespectful and Respondent appropriately dealt with her behavior by directing M.M. by the arm to sit down.

CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the subject matter and the parties pursuant to sections 120.569 and 120.57(1), Florida Statutes.

40. The School Board must prove the allegations in its Notice of Specific Charges by a preponderance of the evidence. *See McNeill v. Pinellas Cty. Sch. Bd.,* 678 So. 2d 476 (Fla. 2d DCA 1996); *Allen v. Sch. Bd. of Dade Cty.,* 571 So. 2d 568, 569 (Fla. 3d DCA 1990); and *Dileo v. Sch. Bd of Dade Cty.*, 569 So. 2d 883 (Fla. 3d DCA 1990).

41. A "preponderance" of the evidence is defined as the "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); *Black's Law Dictionary,* 1201 (7th ed. 1999).

42. It is helpful to outline the collection of laws and policies which apply to this case. They are set out below:

COUNT I - MISCONDUCT IN OFFICE

> 1. Under State Board Rule 6A-5.056, "Misconduct in Office" means one or more of the following:
>
> (a) A violation of the Code of Ethics of the Education Profession in Florida 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.

43. The Code of Ethics of the Education Profession in Florida, Florida Administrative Code Rule 6A-10.081, provides as follows:

(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 to all.

(b) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(c) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

(2) Florida educators shall comply with the following disciplinary principles. Violation of any of these principles shall subject the individual to revocation or suspension of the individual

> educator's certificate, or the other penalties as provided by law.
>
> (a) Obligation to the student requires that the individual:
>
> 1. Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.
>
> * * *
>
> 5. Shall not intentionally expose a student to unnecessary embarrassment or disparagement.
>
> 6. Shall not intentionally violate or deny a student's legal rights.
>
> * * *
>
> 8. Shall not exploit a relationship with a student for personal gain or advantage.
>
> (c) Obligation to the profession of education requires that the individual:
>
> 1. Shall maintain honesty in all professional dealings.
>
> * * *
>
> 7. Shall not misrepresent one's own professional qualifications.
>
> 8. Shall not submit fraudulent information on any document in connection with professional activities.
>
> 9. Shall not make any fraudulent statement or fail to disclose a material fact in one's own or another's application for a professional position.

44. School Board Policy 3210, Standards of Ethical Conduct, provides, in relevant part:

All employees are representatives of the District and shall conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.

A support staff member with direct access to students shall:

* * *

3. [M]ake a reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

* * *

7. [N]ot intentionally expose a student to unnecessary embarrassment or disparagement.

* * *

9. [N]ot harass or discriminate against any student on any basis prohibited by law or the School Board and shall make reasonable efforts to assure that each student is protected from harassment or discrimination.

* * *

17. [M]aintain honesty in all professional dealings.

* * *

22. [N]ot engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable efforts to assure that each individual is protected from such harassment or discrimination.

* * *

> 21. [N]ot use abusive and/or profane language or display unseemly conduct in the workplace.
>
> * * *
>
> 25. [N]ot misrepresent one's own professional qualifications.
>
> 26. [N]ot submit fraudulent information on any document in connection with professional activities.
>
> 27. [N]ot make any fraudulent statement or fail to disclose a material fact in one's own or another's application for a professional position.

45. *Gross Insubordination*, as defined by the School Board with reference to Florida Administrative Code Rule 6A-5.006, means the intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority, misfeasance, or malfeasance as to involve failure in the performance of the required duties.

46. In a DOAH hearing, the case is considered "de novo" by the ALJ based on the facts and evidence presented at the hearing. This means the evidence is heard anew and considered again. Likewise, there is no "presumption of correctness" that attaches to the agency's preliminary decision. *Fla. Dep't of Transp. v. J.W.C. Co.,* 396 So. 2d 778 (Fla. 1st DCA 1981), and *Boca Raton Artificial Kidney Ctr., Inc. v. Fla. Dep't of HRS*, 475 So. 2d 260 (Fla. 1st DCA 1985).

47. Factual findings in a recommended order are uniquely within the province of the ALJ to determine, based on the broad discretion afforded to her or him. *Goin v. Comm'n on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995). *See also Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Bevs. & Tobacco,* 475 So. 2d 1277 (Fla. 1st DCA 1985).

48. More specifically, the ALJ has the best vantage point to resolve conflicts, determine the credibility of witnesses, draw permissible and reasonable inferences from the evidence, and reach ultimate findings of fact based on the competent and substantial evidence presented. *Goin,* 658 So. 2d at 1138; *Dep't of Bus. & Prof'l Reg. v. McCarthy,* 638 So. 2d 574 (Fla. 1st DCA 1994).

49. Whether Respondent committed the charged offense(s) is a question of ultimate fact to be decided by the trier-of-fact in the context of each alleged violation. *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

50. An agency may not substitute its own facts for that of the ALJ so long as there is adequate evidence in the record to support the ALJ's factual findings. *Lantz v. Smith,* 106 So. 3d 518 (Fla. 1st DCA 2013). *See also Resnick v. Flagler Cty. Sch. Bd.*, 46 So. 3d 1110, 1112-13 (Fla. 5th DCA 2010)("In a fact-driven case such as this, where an employee's conduct is at issue, great weight is given to the findings of the [ALJ], who has the opportunity to hear the witnesses' testimony and evaluate their credibility.").

51. The School Board alleges, in part, that Respondent used improper physical means to oversee, manage, or control her physical education students. There is a body of case law addressing the use of reasonable physical force by a teacher or staff member.

52. One Florida case, cited by several other courts around the nation, addresses the authority of Florida teachers to control disruptive or unruly students in the classroom.

53. In the seminal case of *Williams v. Cotton,* 346 So. 2d 1039 (Fla. 1st DCA 1977), the district court considered a civil lawsuit naming a teacher, Williams, as a defendant for certain injuries received by one of his students during a classroom altercation.

54. The district court examined former section 232.27, Florida Statutes, which required teachers to "control their pupils" and "keep good order" in the classroom. This authority still exists. *See* § 1003.32, Fla. Stat.

55. As background in *Cotton*, the case revealed that the student was "unruly, boisterous and was disturbing the other students." After repeated requests by the teacher, Williams, to quiet down and take a seat, the teacher and student engaged in a physical confrontation necessitated, according to the teacher, by his attempt to restore order in his classroom. Apparently, *Cotton* was physically injured during this confrontation and sued.

56. Although the primary issue in *Cotton* was whether the evidence supported the jury's verdict of liability, the district court felt it necessary to comment on the extent of a teacher's authority and duties in Florida. The court commented that teachers have the power and clear duty under the law to control their classroom and restore order. Of particular interest is the following quote from the court:

> This statute (F.S. 232.27), in authorizing – in fact requiring – a teacher to "keep good order" in his classroom necessarily implies a power to the teacher to use reasonable physical force (not amounting to corporal punishment) to do so. Without such reasonably implied power, the requirement to "keep good order" would be meaningless.

See, e.g., Virgil L. Morgan, as Superintendent of Schools of Broward Cty. v. Karen Siebelts, 1989 WL 645004 (Fla. Div. of Admin. Hrgs. June 29, 1989).

57. The *Cotton* case was subsequently cited by the Supreme Court of Nebraska in *Daily v. Board of Education,* 588 N.W. 2d 813 (Nebraska 1999). Although the *Daily* decision dealt primarily with the issue of what constituted corporal punishment in a school setting, it approved and emphasized the *Cotton* court's comments and stated:

> The Florida court found that a Florida statute requiring teachers to "keep good order" in the classroom necessarily implies a power to the teacher to use reasonable physical force (not amounting to corporal punishment) to do so. The court found that without such reasonably implied power, the requirement to keep good order would be meaningless.

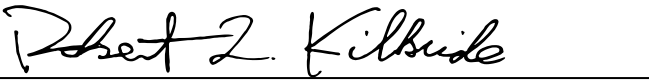
58. Finally, in *Daniels v. Gordon,* 503 S.E. 2d 72 (Ga. Ct. of App. 1998). *Cotton* was cited again for the proposition that the use of reasonable physical force may be appropriate under some situations that arise when a teacher seeks to restore order and regain control of the classroom. *See also Peterson v. Baker,* 504 F.3d. 1331 (11th Cir. Ct. App. 2007).

59. Applying the relevant facts to the law, and reasonably interpreting the applicable rules and policies the School Board seeks to enforce, the undersigned concludes that the School Board did not present sufficient or persuasive evidence to prove the charges in the Notice of Specific Charges. Accordingly, there is not a sufficient factual basis to discipline Respondent for the charges asserted.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a final order dismissing the charges against Respondent and awarding her appropriate back-pay for her period of suspension.

DONE AND ENTERED this 28th day of May, 2021, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
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this 28th day of May, 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.