
 In the Matter of the Arbitration between)
)
Sarasota Classified Teachers Association) AAA 32 390 00145 09
) Discharge
 and) Grievant: Diana O'Neill
)
Sarasota County Schools)

BEFORE : Mark I. Lurie, Arbitrator

APPEARANCES

Sarasota Classified Teachers Association : Mary F. Aspros, Esq.
Peter M. Collins, Esq.

Sarasota County Schools : Arthur S. Hardy, Esq.

This is a grievance arbitration decision issued pursuant to the collective bargaining agreement (the "Agreement" or the "CBA") between the Sarasota Classified Teachers Association (the "Union") and Sarasota County Schools (the "District"), effective July 1, 2006 through June 30, 2009. Upon due notice, the parties appeared at the prescribed arbitration hearing time and place: the District's administrative office in Sarasota, Florida, at 10:00 a.m. on July 21, 2009. The hearing was conducted on that date and the following day, during which the parties were afforded the opportunity to present their respective positions and the evidence in support of those positions, including the testimony of witnesses, and to cross-examine and rebut the testimony of opposing witnesses. The witnesses were sequestered. The hearing was transcribed; the transcription is the official record. The parties stipulated that the grievance was arbitrable and properly before the Arbitrator, that it was a dispute contesting just cause for discharge, and that no due process challenges had been raised to the issuance of the discipline or to the processing of the grievance. Written closing statements were received and exchanged by the Arbitrator on August 21, 2009, as of which date the hearing was declared closed.

ISSUE

The parties agreed to the following statement of the issue: Was the discharge of Diana O'Neill done for just cause and, if not, what is the proper remedy?

RELEVANT CBA PROVISIONS, STATUTES AND SCHOOL BOARD POLICY

CBA Article XXV - Disciplinary Actions

A. Scope of Article

1. This article covers actions involving oral or written warnings, written reprimands, suspensions, demotions, dismissals, or reductions in grade or pay with prejudice.
2. Disciplinary action may not be taken against a teacher except for just cause, and this must be substantiated by sufficient evidence which supports the recommended disciplinary action.
3. All facts pertaining to a disciplinary action shall be developed as promptly as possible. Actions under this Article shall be promptly initiated after all the facts have been made known to the official responsible for taking the actions.

B. Disciplinary action shall be governed by applicable statutes.

C. A teacher against whom disciplinary action is to be taken may appeal the proposed action through the grievance procedure.

...

H. Previous charges or actions that have been brought forth by the administration may be cited against the teacher if these previous acts are reasonably related to the existing charge. All previous charges or actions must have been shared with the teacher.

1. The discipline, dismissal, demotion, and suspension of any teacher shall be for just cause.
2. Where just cause warrants such action(s), a teacher may be demoted, suspended, or dismissed upon recommendation of the immediate supervisor to the Superintendent of Schools. Except in cases that constitute a real immediate danger to the district or other flagrant violation, progressive discipline shall be administered as follows:
 - a. Verbal reprimand. (Written notation placed in site file.)
 - b. Written reprimand filed in personnel and site files.
 - c. Suspension with or without pay.
 - d. Dismissal.

Florida Statutes. Section 1012.33[1](a)

Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

Florida Administrative Code

Rule 6B-4.009, Criteria for Suspension and Dismissal

The basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36, Florida Statutes. The basis for each of such charges is hereby defined:

...

- (3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, FAC, and the

Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, FAC, which is so serious as to impair the individual's effectiveness in the school system.

Florida Administrative Code - State Board of Education Rule 6B-1.006(3)
Principles of Professional Conduct for the Education Profession in Florida

- (1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.
- (2) 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.
- (3) Obligation to the student requires that the individual:
 - (a) 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.
 - (b) Shall not unreasonably restrain a student from independent action in pursuit of learning.
 - (e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.
 - (f) Shall not intentionally violate or deny a student's legal rights.
 - (g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

SCHOOL BOARD POLICY CHAPTER 5.00 – STUDENTS

STUDENT CONTROL – 5.30

- II. The teacher, other members of the instructional staff or bus driver shall assume such authority for the control and supervision of students as may be assigned by the principal or the principal's designated representative and shall keep good order in the classroom or other places when in charge of students.

C. Corporal punishment shall not be administered in the Sarasota County School System.

SCHOOL BOARD POLICY CHAPTER 6.00 – PERSONNEL

COMPLAINTS AGAINST EMPLOYEES – 6.36

- II. It is the duty of all employees to report to the Superintendent alleged misconduct by any School Board employee that affects the health, safety or welfare of a student as required by Florida Statute and School Board policy.

FACTS

Diana O'Neill has been employed by the District as a teacher of exceptional education at the Venice Elementary School for the past 18 years. "Exceptional education" is the term given to training children who have severely limited mental capabilities and who often have physical incapacities as well. The training ranges from acquiring basic life abilities such as toilet use, self-feeding and clothing, walking, and grasping, to traditional, albeit rudimentary, educational skills. The objective of the training is to enable each child to attain the maximum degree of self-sufficiency to which he or she is capable and to achieve, to the extent possible, social appropriateness and independence.

Ms. O'Neill testified that throughout her teaching career, she had demanded an expenditure of effort from her students, with the expectation that each could achieve an increment of improvement. Other witnesses corroborated this self-assessment, and none disputed it. The children in Ms. O'Neill's care would often initially resist the exertions required of them and, because many were unable to speak, would protest with plaintive sounds. In such instances, the inclination to comfort the distressed child – to "mother" him or her – if acted upon, was counter-productive, and could result in "learned helplessness."

Throughout her employment at Venice Elementary School, Ms. O'Neill has achieved results through persistence, inventiveness, and a determination to "take each child to the next level." (Her words.) Ms. O'Neill consistently received perfect work evaluations from Venice Elementary School Principal Theresa Baus and, prior to the discharge action that is the subject of this arbitration, she had not been issued discipline. Principal Baus testified that she considered Ms. O'Neill to be an expert in the field of teaching profoundly mentally disabled students. Ms. O'Neill has also worked extensively outside the classroom with volunteer organizations, including the Special Olympics, Easter Seals, and *In Stride*, a horseback riding therapy program.

During 2007, Ms. O'Neill had 5 children in her classroom. The District charges that, during that year, Ms. O'Neill's attitude changed, and she became physically and verbally abusive to her students.¹ In February 2009, Superintendent of Schools Lori M. White filed a PETITION FOR TERMINATION OF EMPLOYMENT (the "PETITION") with the School Board of Sarasota County, seeking Ms. O'Neill's discharge.² The PETITION alleged that

¹ Ms. O'Neill was tried on four counts of criminal child abuse. A jury found her not guilty of all four counts.

² Paragraphs numbers 10, 11 and 12 set forth, in abbreviated form, the charges against Ms. O'Neill. They are presented here, verbatim:

Ms. O'Neill's conduct had constituted a "flagrant violation of her responsibilities as a teacher," and that she had committed the following rule violations:

School Board Policy 5.30(II)(C),
 State Board of Education Rule 6B-1.006(3)(a),(b),(e),(f), and (g)
 general misconduct in office and
 insubordination.

The following describes the charges of misconduct that were made against Ms. O'Neill, and the evidence pertaining to those charges. The alleged incidents of abuse are

10. During the time period referenced in paragraph 9 above, Respondent engaged in inappropriately rough physical treatment of students, including corporal punishment, including the following on or about the dates listed:

- a. On numerous occasions, including December 5, 12, [and] 17, 2007, and January 7, 9, 11, 14, 15, 16, and 17 struck student O.D. on or about the head with various objects including a "month board," a water bottle, an activeboard pen, her arm brace, a binder, papers, a circle board, a catalog, and Respondent's hand;
- b. On numerous occasions, including December 4, 10, 12, 17, and 18, 2007, struck student A.S. on or about the head with various objects including a "month board," a water bottle, student O.D.'s arm brace, a binder, and Respondent's hand;
- c. On December 3, 2007, and January 25, 2008, twisted student T.M.'s hand behind his back;
- d. On December 12, 2007, kicked student O.D. several times;
- e. On December 18, 2007, kicked student A.S. several times;
- f. On January 14, 2008, struck student O.D. on the hand;
- g. On January 18, 2008, kicked student O.D.;
- h. On several occasions during December 2007 and January 2008, pushed student O.D. causing her to trip and fall;
- i. On January 29, 2008, struck student T.H. in the head with Respondent's hand;
- j. On numerous occasions roughly fed and cleaned the mouth of students A.S. and T.H. causing T.H.'s gums to bleed and resulting in A.S.'s losing a tooth on October 29, 2007;
- k. On several occasions pulled skin off student T.H.'s lips causing them to bleed;
- l. On several occasions, bent the hands and pinched the thumb of student T.H.

11. During the time period referenced in paragraph 9 above, Respondent misused therapy tools and equipment on students, including the following on or about the dates listed:

- a. On October 22, 2007, placed a "gait belt" under the arms of student A.S. and roughly yanked him 3 to 4 times off the floor and leaving visible marks on his body;
- b. On January 18 and 25, 2008, placed student O.D. in a "body sock" and, on January 25, wrapped O.D. in a weighted body blanket;
- c. On January 25, 2008, placed student A.S. in a body sock.

12. During the time period referenced in paragraph 9 above, Respondent used inappropriate and disparaging language directed toward students and otherwise made disparaging remarks about students to third parties, including the following on or about the dates listed:

- a. referred to student O.D. as "oblivia";
- b. stated student T.H. was "a waste of human air";
- c. stated student T.H.'s mouth looked like a "butt hole";
- d. often referred to students in her class as "retards";
- e. stated her actions would not make the students "any more retarded."

set forth in chronological order, for reasons that will later be explained. The evidence in support of the allegations consists of the testimony of two teacher's aides³ who were assigned to Ms. O'Neill's classroom between October 2007 and January 2008: Cindi Anderson and Tamara Lynn "Tami" Cooke. Their testimony was corroborated, in some instances, by Ms. O'Neill. Those three persons – Anderson, Cooke and O'Neill – were the only testifying witnesses to the events underlying the charges in this case.

Both Ms. O'Neill and physical therapist Shirley Taylor Shaw described Ms. Anderson and Ms. Cooke as persons whose empathy for PMI children was sometimes counter-productive: whose intercession in response to children's resistance to new therapies sometimes undermined the utility of those therapies and, instead, reinforced the children's resistance and aversion to the therapies. Ms. O'Neill testified that, whereas she had high expectations for her pupils, she believes that Mss. Anderson and Cooke had low expectations, and acted accordingly.

October 12, 2007

An 8-year-old pupil named Olivia, diagnosed with chromosome deletion, exhibited the mental development of an 18-month-old. Among Olivia's deficits was an inability to speak and unsteadiness on her feet. TAs Anderson and Cooke testified that, during a classroom toilet break, Ms. O'Neill grasped Olivia and directed her away from her desk and toward the bathroom while saying (according to Ms. Anderson) "Oh, no. You're not sitting down, you're going to the bathroom." According to the TAs, Ms. O'Neill pushed Olivia toward the bathroom, causing her to trip and fall to the floor, where she struck the side of her head.⁴ Ms. Anderson and Ms. Cooke contend that Olivia tripped and fell only because Ms. O'Neill had pushed her. Ms. O'Neill contends that she had not pushed Olivia, and that the cause of her falling had been that she had tripped over a leg of her desk which, at the time, Ms. O'Neill was trying to guide her around. Following her fall, Ms. O'Neill escorted Olivia to the nurse's clinic.

3 Ms. Anderson and Ms. Cook served as "PMH" aides, the acronym standing for "Profoundly Mentally Handicapped."

4 TA Cooke described the incident as follows:

"...Diana kind of just leaned over the desk and kind of guided or pushed Olivia up into the upright position. And then she turned her around like this to look to the bathroom, she said, "Go," and she just gave her a good push. And Olivia kind of had her foot tangled in the chair, I believe, and she fell really hard on her head."

October 22, 2007⁵

- Teachers Aides ("TAs") Anderson and Cooke each testified that, while returning from the school cafeteria after lunch, an 8-year-old pupil named Adam, who had been diagnosed with a form of Downs Syndrome and who had just learned to walk,⁶ sat down in the corridor and resisted Ms. O'Neill's urging that he get to his feet and walk to the classroom. According to the TAs, when Ms. O'Neill and Adam finally returned to the classroom, Ms. O'Neill placed a "gait belt" – a harness with which the stride (i.e., the "gait") of an individual can be controlled – on Adam, who weighed about 30 pounds. The gait belt had been furnished by physical therapist Shaw. Gait belts can serve therapeutic purposes, and the Arbitrator finds that placing the belt on Adam did not, in itself, constitute abuse. According to TA Anderson, Ms. O'Neill, holding the straps of the gait belt, pulled Adam off the ground and dropped him down on his buttocks. She did this in such rapid succession that Adam was incapable of coming to his feet. Ms. Anderson testified that she believed that Ms. O'Neill was disciplining Adam for having sat in the hallway.

TA Cooke, as well, testified that Ms. O'Neill first placed Adam in the gait belt when the two returned to the classroom after lunch, and that Ms. O'Neill appeared to be using the gait belt to make Adam stand and remain standing by repeatedly lifting him off the ground and telling him "You are going to stand up." Each time, Adam resisted by folding his legs under him:

"And so he would go down, and she would yank him back up, and he would go down, and eventually it was kind of like his knees were just kind of up, and he was just like a yo-yo, yanking him up and down."

Ms. Cooke testified that she could not remember the outcome of Ms. O'Neill's efforts.⁷

Ms. O'Neill contested the TAs' testimonies. According to Ms. O'Neill, she had placed the gait belt on Adam while he was walking in the corridor, for the purpose

⁵ Ms. Anderson testified that she was unable to recall the dates on which these October 2007 events occurred; nor the order in which they occurred. The incident dates, when specified in this decision, are derived from written notes made by TA Tamara "Tami" Cooke.

⁶ Ms. O'Neill first started working with Adam when he was 5 years old. Adam was initially unable to walk or even stand. In the ensuing 3 years, Ms. O'Neill trained him to walk, initially with the use of a walker and, by the summer of 2007, without one.

⁷ On the morning of the same date, October 22, 2007, a report was filed with Nurse Pillsbury indicating that Adam had received a red mark on his neck from the abrasion of a school bus seat belt. The Arbitrator finds that suggestions that the mark was inflicted, instead, by the gait belt are unproven.

of controlling his habit of wandering. While in the corridor, and in only the corridor, she had used the gait belt to lift him from a sitting position three times when he had refused to stand. She testified that she had done so at a deliberate speed, while coaxing Adam to extend his legs and support his weight, and that she had not "dropped" him onto the floor but that, each time she had lowered him, she had done so all the way to the floor. She testified that her use of the gait belt had not caused Adam any injury.

October 23, 2007

On October 23, 2007, TAs Anderson and Cooke reported their observations of October 12 and October 22 to School Nurse (RN) Mary Pillsbury who, in turn related the information to Principal Baus. Principal Baus testified that she then spoke directly with Ms. O'Neill about both incidents, and took possession of the gait belt. Principal Baus testified that she found Ms. O'Neill's explanation of how Olivia had tripped and fallen to have been believable.

Asked whether she gave Ms. O'Neill "any type of verbal warning," Principal Baus testified that she told Ms. O'Neill, variously, not to use the gait belt in the future, and also "...that she was not to hit my children or hurt them or treat them roughly in any way," and that, if any child in her classroom was hurt in any way, she was to fill out an accident report and inform Baus immediately. Asked why she would have told Ms. O'Neill not to "hit" any child if no such allegation had been related to her, Ms. Baus testified that Nurse Pillsbury had told her that O'Neill had "*hit* Olivia when she got up and had her foot there, and she *hit* her on the arm and pushed her over..." (Arbitrator's emphasis.)

Principal Baus testified that she had not told Ms. O'Neill to consider the foregoing admonitions to have constituted a "verbal warning" for disciplinary purposes. Principal Baus testified that she had not advised Ms. O'Neill that the purpose of the meeting might be disciplinary because she had been certain that Ms. O'Neill would have a valid explanation for what had been reported about her. However, she also testified that she was not a hundred percent sure that Ms. O'Neill had not hit Olivia, as had been charged. And she testified that she neither reprimanded Ms. O'Neill nor took disciplinary action against her for either event. And she did not advise Ms. O'Neill of the possibility of discipline for the future inappropriate treatment of the students.

Nurse Pillsbury, like principal Baus, is a "mandatory reporter," meaning that she has a regulatory duty to report any suspected student abuse to the Florida Department of Children and Families. She filed no report with regard to any of the allegations in this case because, she says, they were that – allegations of abuse – for which she had not been presented with corroborating physical evidence.

October 29, 2007

- The aforesaid Adam occasionally regurgitated his food. TAs Anderson and Cooke testified that, in one instance, following a regurgitation, Ms. O'Neill was cleaning him with a wet wash cloth, including the inside of his mouth. Adam bit down on the washcloth and Ms. O'Neill pulled it out vigorously, bringing with it a tooth that was propelled over her shoulder. Ms. Anderson and Ms. Cooke testified that, the next day, Adam's mother told them that the tooth had not been loose. Adam's mother did not testify in the arbitration hearing, and the statement attributed to her is hearsay as to the condition of the tooth. Mss. Anderson and Cooke testified that it took several months for the replacement tooth to grow in.

Photographs of the tooth were admitted into evidence. Ms. O'Neill's dentist testified as an expert witness as to the condition of the tooth, based solely upon his examination of the photographs. He opined that Adam's tooth had been loose and was "ready to come out" on the day that Ms. O'Neill had pulled it out with the wash cloth.

Mss. Anderson and Cooke shared their observations with Nurse Pillsbury. Ms. Pillsbury advised the TAs to document any further acts by Ms. O'Neill that they considered to be wrong, "so they could go and talk to Ms. Baus about it at some point." (Quoting Nurse Pillsbury)

Neither Ms. Anderson nor Ms. Cooke reported these or subsequent incidents to Principal Baus prior to the end of January 2008, notwithstanding that they regularly passed Ms. Baus in the hallways and were asked by her how things were in Ms. O'Neill's classroom. In response to that question, their consistent answer was that things were "fine."

According to the TAs, Ms. O'Neill's maltreatment of students abated from October 29 to December 3, 2007 when, they allege it resumed, and on which date Ms. Cooke started taking notes. Nurse Pillsbury testified that, in early December, Mss. Anderson

and/or Cooke informed her of "verbal abuse and different things going on." There is no evidence that Ms. Pillsbury informed Principal Baus of this, and no disciplinary action was taken nor counseling issued.

Ms. Anderson testified that she first read Ms. Cooke's notes following their being typed in late January 2008, that she signed the typed notes, and that the notes accurately reflected what she had observed. She also testified, however, that she had not observed each of the incidents described in those notes. The Arbitrator gives no evidentiary weight to these notes (School Board Exhibit 6) aside from their existence, and relies solely on the testimony of TAs Anderson and Cooke as to the matters they claim to have observed, with this single exception: the Arbitrator has set forth the chronology of the events testified to by Mss. Anderson and Clark by relying on the dates attributed in the notes. In the account that follows, charges of mistreatment that was of a recurrent nature are set forth under the caption "Various dates," immediately below.

Various dates

- TAs Anderson and Cooke testified that Ms. O'Neill would "bop" children on the head with various objects, or with her hand. They ascribed to the word "bop" a force sufficient to get a child's attention, but less than that which would inflict pain or injury. In Ms. Cooke's words, it was "not really a tap and... not like 'wham'." Ms. Anderson testified that some children sometimes cried after being bopped, from which she – Anderson – deduced that the contact had discomforted the child; and Ms. Cooke testified that the children, none of whom could speak, would make sounds indicating their unhappiness with the contact. TA Cooke testified that Ms. O'Neill often bopped a pupil and spoke an admonition when they gave a wrong answer or, when students were placing their hands in their mouths, would hit the hands away. The objects used included a piece of carpet-covered hollow-core board, small catalogs, empty tennis ball containers that had been assembled to serve as an arm brace⁸, and water bottles that were generally full or partially filled. Ms. Anderson described how, if a student cried after Ms. O'Neill had bopped him, she – Anderson – would tell O'Neill to "Leave him alone," and would comfort the child by hugging him. Ms. Anderson testified that, when she told Ms. O'Neill that

⁸ The arm braces, which Ms. O'Neill constructed out of empty tennis ball cans and other parts, were used to restrict the range of motion of children's arms for the purpose of preventing them from putting their hands in their mouths. The braces were an alternative to such measures as placing socks on the children's hands. Such cobbled-together solutions were necessary because of budget constraints.

bopping the children's heads was not right, Ms. O'Neill replied "What's it going to do, give them brain damage? They're already retarded." Ms. O'Neill denies having used the word "retarded" in any derogatory way, and testified that her reference to "brain damage" was by way of explaining that the force of her "bopping" was insufficient to inflict it.

Ms. O'Neill acknowledged, in her testimony, that she had used objects to tap her pupils on the head; that she had done so in a playful manner to get their attention; and that the objects had included water bottles (containing varying amounts of water) partially encased in a rubber foam insulating sleeve referred to by the witnesses as a "koozie." She testified that the action often complemented her making a vocal "buzzer" sound to indicate that the student had given a wrong answer. She described the "bopping" as not disciplinary in nature but, rather, was a way to make learning fun and to maintain students' attention. She testified that the bopping never caused her students injury, pain or even discomfort, and was not done out of anger or frustration.

Occupational therapist Elaine Longobardi testified that, for children with short attention spans, like Adam and Olivia, "tactile cues" were useful. She defined a *tactile cue* as the act of placing your hand on the child in order to direct their attention to your face or the object or activity being worked. Asked whether she would ever use an object other than her hands, she said "No... As a therapist, we use our hands."

No fellow teacher, no therapist and no school official other than TAs Anderson and Cooke testified that, while they were present in her classroom, Ms. O'Neill had "bopped" a child. The Union emphasized, during its questioning of witnesses, that therapists and others had ready access and frequently visited her classroom.

Speech language pathologist Theresa Miers-Pandolfi testified that she thought it would not be appropriate to "hit" a student in the head "with a water bottle" when they did something wrong. And Principal Baus testified that, while she had never taught PMH students, in her opinion, it was "absolutely inappropriate" for a teacher to tap students with the variety of objects that Ms. O'Neill had; that it was "inappropriate to hit a student for giving a wrong answer."

- Ms. O'Neill referred to Olivia as "Oblivia." Ms. Anderson ascribed the nickname to derision; Ms. Cooke attributed it to Olivia's being "happy-go-lucky"; and Ms. O'Neill testified that she used it as a term of endearment, the implications of which Olivia would not have comprehended.
- Mss. Anderson and Cooke testified, and Ms. O'Neill confirmed that she had commented that Olivia's mouth looked "like a butthole." Ms. O'Neill testified that it was an "off-the-cuff comment" that she made to the TAs which she had intended to go no further; which was over the top, even for her; was unprofessional; and which she regrets having said.
- Both TA's testified that Olivia had an impulse to place her hands in her mouth, and that Ms. O'Neill would try to get her to stop by slapping them away or jerking them out, chiding "Get your hands out of your mouth." Ms. Anderson testified that, sometimes, Ms. O'Neill would push Olivia's hand in further. Ms. Anderson acknowledges that none of this caused harm to Olivia. Ms. Cooke opined that Ms. O'Neill should not have been slapping Olivia's hands or pulling them from her mouth; that doing so was "just mean." She testified that, "...sometimes [Olivia's] hand would be in her mouth so hard that she'd -- like, her -- you know, it would hurt her."

Ms. O'Neill acknowledged that she would urge Olivia to remove her hands from her mouth, and would physically remove them. She did this both for the benefit of Olivia's hygiene, and because the habit was socially inappropriate. She denies having ever pushed Olivia's hand further into her mouth.

- Ms. Anderson testified that Ms. O'Neill sometimes urged Adam to walk more quickly by nudging him in the buttocks with her foot. Ms. Anderson described the action not as a kick, but a boost, "lifting up his butt, getting him to move along." Ms. O'Neill acknowledged having done this, and referred to the action as a "distal prompt":

"I just reached my foot out, and with the -- like the ball of my foot and my toes, I just tapped him to propel him forward, in his -- it would be on his -- on his bum, because that's where center of gravity is..."

Physical therapist Shirley Shaw testified that the use of the sole of one's foot on the buttocks of a child to propel him forward would not be appropriate, and that she had never used such a technique. Occupational therapist Elaine Longobardi,

as well, testified that she would not place her foot on a student's buttocks to urge him along.

- Tara, a child who had undergone a hemispherectomy, was non-ambulatory, incontinent, cortically blind and non-verbal. Tara often had dry lips, and Ms. Anderson and Ms. Cooke testified that, on several occasions during the 2007-2008 school year, Ms. O'Neill pulled the flap of dried skin off Tara's lip, causing the lip to bleed at the attachment point of the removed skin. Ms. O'Neill confirmed that she had pulled the skin off once, during the 2004-2005 school year⁹, and gave the following reasons for having done so:

"I didn't think it looked very attractive... I like my children to... be seen in the best light, you know. You know, I'm not saying she has to be a beauty queen or anything, but there are certain things you can do that -- you know, she's already in a wheelchair. There are other things you can do to -- to not draw attention, especially negative attention, to the children. And I felt that that was a negative attention getter. So I popped it off. There was like a pin size -- a pinhead size drop of blood that stopped immediately with pressure from a Kleenex. [Tr. at 587]

Q. [You] commented to [Tara's mother] "Don't you just want to pull that skin off?"

A. Yes. It bothered me. It --

Q. It bugged you to have that there?

A. Yeah.

Q. And on one occasion, at least, I think you said you did pull that skin off and got a little bit of blood?

A. Yeah, just a pin -- pinpoint, yeah.

Q. And you -- you only did that one time?

A. Yes.

Q. Did you ever discuss that with the school nurse?

A. No. [Tr. at 587]

- When Ms. O'Neill fed Tara, her gums often bled. Ms. O'Neill testified that she attributed this to her efforts to optimally position the food in Tara's mouth, together with the increased proclivity for gum bleeding caused by Tara's receiving anti-seizure medications. Mss. Anderson and Cooke testified that they did not see Tara's gums bleed when others fed her, and Ms. Cooke testified that they did not bleed when she fed her. Ms. O'Neill attributed this to the failure of others to attempt to optimize the food placement.

Speech language pathologist Theresa Miers-Pandolfi testified that she has served as a dysphasia therapist at Venice Elementary School. A dysphasia therapist is someone who examines the oral and pharyngeal structures of a person to

⁹ The time interval ascribed by Ms. O'Neill was when she was last at the "old school." She testified, at page 584 of the transcript, that this would have been during 2004-2005.

determine how food is prepared and then transmitted for swallowing by the mouth, and to identify possible problems and assess the safety of the swallow. Asked whether bleeding should ever occur when a student is being fed, Ms. Miers-Pandolfi replied that it should not and that, should bleeding occur, feeding should cease, the location of the bleeding identified, the safety of continuing feeding determined, and medical attention sought.

Occupational therapist Frease testified that, when she had fed Tara, her gum had bled:

Q: Over the course of your time at Venice Elementary School, did you ever have occasion to feed a student named Tara ***?

A: Yes.

Q: Did her gums ever bleed when you fed her?

A: Yes.

However, this answer differed from one she had given, under oath, in an earlier proceeding:

Q: "Did you ever have any difficulty with [Tara's] gums bleeding when you fed her?"

A: "Not that I recall."

When presented with the inconsistency, Ms. Frease attributed her testimony – that Tara's gums had bled when she had fed her – to a complaint that an aide had made to her about "an incident specifically during summer school." The Arbitrator finds Ms. Frease's testimony to have been unreliable, and shall give it no evidentiary weight.

- Tara had an impulse to keep her thumb in her mouth. Ms. Cooke testified that Ms. O'Neill would sometimes pull it out of Tara's mouth harshly, or would squeeze it, inflicting pain. Ms. O'Neill testified that she would carefully remove Tara's thumb for the benefit of her health, and then dry it, and that the thumb was calloused and sensitive from having been chewed and that Tara would complain.

Ms. Anderson testified that she heard Ms. O'Neill tell Tara that she was a "waste of my human air" and that she was "retarded." Ms. Cooke testified that Ms. O'Neill's statements had been, "You're not worth the oxygen in the air that you breathe" and, "You're taking up good oxygen that I could be breathing." Ms. O'Neill testified that, observing that Tara was unresponsive to any prompting, said to another adult "All she's doing there is sitting there sucking up oxygen." Ms. O'Neill testified that she was confident that Tara did not have a sufficient grasp of language to have understood what was said.

December 12, 2007

- TAs Anderson and Cooke testified of at least two identical incidents – one in the classroom and one in the cafeteria – in which Olivia, while swinging her feet, had kicked Ms. O'Neill three times and Ms. O'Neill had responded, in each instance, by kicking Olivia three times while exclaiming "Well, you kicked me three times, I'm kicking you three times." Ms. Anderson testified that, regarding the cafeteria incident, she saw Ms. O'Neill's foot make contact with Olivia's shin and that, regarding the incident in the classroom, Ms. O'Neill's kicks "made her [Olivia] cry or, you know, pout. It hurt her enough." On the other hand, Ms. Cooke testified that, because the kicking had taken place under the table or desk, she had been unable to observe whether Ms. O'Neill had made contact with Olivia on either occasion. According to Ms. Cooke's notes, these incidents occurred on December 12, 2007 and January 18, 2008.

Ms. O'Neill testified that the incidents happened as TAs Cooke and Anderson described with the important qualification that, while she had told Olivia she would kick her back, she had not done so.

January 25, 2008

- For some persons, being swaddled in a weighted blanket or a body sock can have a soothing effect. Occupational therapist Elaine Longobardi testified that students who have autism or who have difficulty knowing where their muscles are in space, and certain younger students who have difficulty relaxing their body tone usually respond well to the weighted blanket because it gives them feedback of their muscles, termed "proprioceptive input."

On January 25, 2008, Ms. O'Neill wrapped Olivia in a weighted blanket, fastening the blanket in place with Velcro. Ms. O'Neill testified that she did this after observing that Olivia was being "particularly fidgety." Olivia is fearful of new experiences, and resisted by twisting and turning until Ms. O'Neill released her. Ms. Anderson, testified that, while Olivia was writhing inside the blanket, she struck her head on the base of a swing but sustained no physical injury. She acknowledged that, at the time, she – Anderson – had been unaware of the therapeutic purposes of either a body sock or a weighted blanket.

Ms. Cooke testified that she saw the incident and that, while in the blanket, Olivia had repeatedly bent at the waist and "...kept on going up and down and banging her head and her body into the carpeting and the floor" and against the base of the swing. Ms. O'Neill contends that Olivia did not strike her head while in the blanket, and that the duration she spent in the blanket had been "two or three minutes."

Occupational therapist Elaine Longobardi testified that she would not have placed Olivia in a weighted blanket because, in her opinion, Olivia would not have responded well to it. She described the manner in which she applied the blanket to other children: draping it over the child's legs or shoulders. Asked whether the blanket was designed to be rolled up around a child, Ms. Longobardi said that she would not do so. However, Ms. Longobardi further testified that she had attempted to use an apparatus on Olivia, termed the "steamroller," that "almost gives the effect of the weighted blanket." [Quoting Longobardi.]

Following the failed effort with the weighted blanket, Ms. O'Neill placed Olivia in the body sock made by OT Frease.¹⁰ The body sock covered Olivia from head-to-toe, including her eyes. Ms. O'Neill then released Olivia while she was standing. Olivia fell, brushing against a shelf. The severity of the contact is disputed; according to TA Anderson, she uttered a sound indicative of pain.

~~Ms. Cooke observed the foregoing. She testified that she had previously seen a~~ body sock used efficaciously to calm a 17-year-old profoundly mentally handicapped ("PMH") youth, and that she had not thought that there was anything wrong with Ms. O'Neill placing Olivia in a body sock, but that she had not understood why "all of a sudden, just one day out of the blue," Ms. O'Neill had done so.

Occupational therapist Longobardi testified that she would not have used the body sock on Olivia in this fashion because, for Olivia, having her eyes occluded would have been very scary and balance problems would have been a concern.

¹⁰ Ms. O'Neill testified [Tr. 594] that she placed the body sock on Olivia on January 25, 15 or 20 minutes after having wrapped her in the weighted blanket (see immediately below). Ms. Cooke's notes record the date the body sock was used as as having been January 18th.

January 25, 2008

- Ms. Anderson testified about a 14-year-old boy in the class – Taylor – who had autism spectrum disorder and a seizure disorder. Taylor was tantrum-prone, would often require restraining, and would struggle and fight when restrained. Ms. Anderson described how, when Taylor misbehaved in the cafeteria, Ms. O'Neill pinched his finger, twisted his arm behind his back, and made him sit in a chair in the corner. Ms. O'Neill testified that she had sometimes had to forcibly restrain Taylor, and compel him to sit in a "time-out" chair in the corner of the cafeteria. And that, when he would struggle, she would keep her hand on his arm or wrist and keep him in front of her. But she denies having twisted his finger, his thumb or his arm. She testified that her restraint of Taylor described by Ms. Anderson had been done in the Cafeteria, where other teachers and hundreds of students were present and would have seen if she had administered any corporal punishment. Yet only Ms. Anderson made the claim. The Union asserts that it is therefore more likely that Ms. Anderson misperceived what Ms. O'Neill was doing, than that Ms. O'Neill had abused Taylor.

January 29, 2008

- Mss. Anderson and Cooke testified that Ms. O'Neill became frustrated with Tara's repeated failure to select the correct icon on a learning board¹¹ – the icon that represented food rather than drink – and that, in exasperation, she forcefully slapped the side of Tara's head with the back of her hand. Mss. Anderson and Cooke testified that it was this last event that impelled them to present Nurse Pillsbury with the cumulative events of misconduct they had observed and notated.

Ms. O'Neill testified that she had not slapped Tara but, rather, that after Tara had repeatedly chosen the wrong icon,

"I tapped her on the back of the head and I was telling her, 'That is not the one you want.' Her hair went up. Her head did not come forward. She did not whine. She did not really do anything... [It] was an upward motion, because her hair went up, and her head did not come forward."

Asked whether she had tapped Tara out of frustration, Ms. O'Neill stated,

"No. It was a -- it was a -- it was a multi-sensory cue. I was telling her, 'That is not the one you want.' Again, slightly aversive."

Ms. O'Neill explained that, by "aversive," she meant that she intentionally imparted discomfort to the child.

¹¹ The learning board was also referred to as a Tactile Symbol Voice Output device.

Nurse Pillsbury testified that she had been on leave during December and that, upon her return in January, she received reports from TA Anderson and Cooke of Ms. O'Neill's verbal abuse of her pupils. But that it was not until she was informed, on January 29th, that Ms. O'Neill had slapped Tara that she passed the information to Principal Baus. Principal Baus then met with the two aides. At that meeting, according to Ms. Anderson, she told Principal Baus that she,

"... just couldn't take it anymore. I was going to have a heart attack just watching things that were going on. I knew the kids weren't happy with it, were getting hurt, and I just couldn't handle it anymore."

Other Testimony

Ms. Cooke testified that, throughout the interval at issue, Principal Baus had maintained an open-door policy. When asked whether she had considered Ms. O'Neill's conduct to have not been serious enough for her – Cooke – to have reported to Principal Baus, Ms. Cooke answered,

"That is correct. Well, it was serious, but it was just hard to go and talk to her. She's like my boss..."

Asked, then, whether the misconduct had not been serious enough, in her mind, to overcome her concern about talking to Principal Baus, Ms. Cooke said, "No, I guess not."

Occupational therapist Elaine Longobardi described TAs Anderson and, especially, Cooke as having tendencies to "baby" the children, an approach that could be counter-productive. Ms. Cooke testified that she knew that it was important to both demand effort from and disregard protest from the learning disabled pupils, and she acknowledged that she was more of an affectionate "motherly" figure than a disciplinarian. She recounted, for example, an incident in which physical therapist Shirley Shaw had placed a child in a stander and the child's initial response had been crying and hysteria. The therapist cautioned her – Cooke – that if she couldn't witness the experience dispassionately, she should relocate herself to the back of the room. Ms. Cooke testified that, once she knew that the experience would be good for the child, she was fine. Ms. Cooke described Ms. O'Neill as a strict teacher, who used "tough love" to get her students to reach their goals. Ms. Cooke described *tough love* as "doing something for someone that you know is not actually pleasant..., but you know it's for the good of them in the long run."

Nurse Pillsbury testified that during that same 2007-2008 interval, Ms. O'Neill's behavior changed, in that she made deprecating comments about the children. Examples

included "They're stupid. It's not like they're going to college. They don't have to do this because, you know, they're not going anywhere." "They're stupid idiots." Nurse Pillsbury testified that she could not recall the context in which Ms. O'Neill had made these comments, but that "Maybe we were talking about them doing something." Ms. O'Neill acknowledged, in this arbitration, having said, sarcastically, that the her pupils were "not going to be taking the college track."

Speech language pathologist Theresa Miers-Pandolfi testified that she has known and worked with Ms. O'Neill for about 12 years but that, during the 2007-2008 school year, scheduling problems arose that required her to reduce the amount of therapy she furnished jointly with Ms. O'Neill and, instead, to furnish the therapy without the latter's participation. Ms. Miers-Pandolfi described these as

"big scheduling difficulties" that entailed "negotiating how we were going to deliver services to one student, because Ms. O'Neill had what she needed to accomplish, I had what I needed to accomplish, so we were butting heads..."

Similarly, when occupational therapist Elaine Longobardi was asked whether she saw Ms. O'Neill's demeanor change during the 2007-2008 school year, she replied "Well, it just got more difficult to schedule students. I don't know why."

Physical therapist Shirley Taylor Shaw testified that she had worked with Ms. O'Neill since 1999 and whereas, during the 2007-2008 school year, she had still thought that Ms. O'Neill remained a dedicated teacher, she seemed to have become "burnt out," which was exhibited by difficulty in scheduling:

"...that's a hard class, and over the years it takes its toll on all of us. And it was just that -- it was just, like I say, more difficult to schedule..."

One person who testified that she did not see signs of "burn out" was OT Linda Frease. Ms. Frease testified that in December 2007, she introduced Ms. O'Neill to a new reading strategy for the severely disabled, and that Ms. O'Neill grew enthusiastic about it. Asked whether she had considered Ms. O'Neill to have seemed "burnt out" at that time, Ms. Frease said "No." For the reason set forth on page 14 of this decision, the Arbitrator finds Ms. Frease to have been an unreliable witness, and so gives evidentiary weight to none of her testimony.

During their meeting on October 25, 2007, Principal Baus asked Ms. O'Neill whether she was suffering from burnout, and Ms. O'Neill replied that she didn't know, and that she would think about it. Ms. O'Neill testified that the reason she had given that response was that, at the time, she had been upset that Principal Baus had admonished

her for having used the gait belt. She testified that she had not been burnt out. As evidence, she submitted a receipt for a text – Four-Blocks Learning System – purchased at her own expense on December 3, 2007 and offered to show her interest in pursuing a new method for teaching reading. She testified that she had investigated other teaching methods and devices as well, up to the day that she was notified of her discharge.

Speech language pathologist Theresa Miers-Pandolfi testified that Ms. O'Neill "always worked hard with her kids"; always believed that each student "could do something, each student could learn"; and that she – O'Neill – exhibited a "willingness to try to learn new ways, or go to workshops, or seek out how to learn things to make the kids better..." Ms. Miers-Pandolfi testified that, during the 12 years she had worked with Ms. O'Neill, she had not seen her do anything physical with a student that was inappropriate.

Ms. O'Neill testified that she has a sarcastic sense of humor, that sarcasm and humor are a "big part" of who she is; and that she used humor to relieve the stress inherent in the work she does. Ms. Miers-Pandolfi testified that Ms. O'Neill had a dry, witty and sarcastic sense of humor, that would be "meaningful to people that are working in that environment"; that would not have been comprehended by the children in her charge; and that served as a means of relieving the stress of a stressful job.¹² Ms. Miers-Pandolfi testified that Ms. O'Neill's humor did not affect the ways in which she cared for or taught her students. Similarly, physical therapist Shirley Taylor Shaw, who had worked with Ms. O'Neill, observed,

"...we all have a sense of humor, and sometimes it can be a little dark, but honestly, that's how we cope. When you consider what we have to do day in and day out, the limited amount of progress that we see, how involved the students are, you know, it's – for us, it doesn't seem that off the wall, but I guess by some standards, I guess it just depends on what you know, what you're used to, and what you have to deal with."

¹² Ms. Miers-Pandolfi described the teaching conditions as follows:

"...it's a high-maintenance classroom, in that it's – you need continuous monitoring for safety, continuous monitoring that the learning activities are going on, that the therapists are asking you to implement things, so I guess with bathrooming and toileting and implementation of all of the needs, plus safety, to me, that would be a very high-maintenance classroom."

Speech language pathologist Miers-Pandolfi, physical therapist Shirley Shaw and occupational therapist Elaine Longobardi each testified that, subsequent to the events in this case, they agreed, among themselves, that they would not individually remain in a room with TAs Cooke and Anderson. Ms. Miers-Pandolfi described their rationale as follows:

"We decided to change our therapy model based on the situation that arose with this case, and we want to professionally protect ourselves because we felt, as a group, we did not want to expose ourselves to anything similar and be with people that might not really understand what a treatment is and what isn't. And you do have to have some level of training with some of the things that we do to differentiate those things."

Ms. Shaw explained it this way:

"If you don't have the background and you don't understand, you can misinterpret some of the things that we'll do, that we do, and you can misinterpret the intent when we do some activities if you don't understand the philosophy around ESE." (ESE is the acronym for "exceptional student education.")

THE DISTRICT'S POSITION

The Superintendent has proven that there was just cause for the termination of Ms. O'Neill's employment. The evidence presented at the arbitration hearing established that Ms. O'Neill engaged in repeated improper conduct with her students over a several-month period during the 2007-08 school year. Her misconduct included frequent excessively rough treatment such as hitting students on or about their heads, both with her hands and with numerous other objects; kicking, pinching, and pushing students; roughly feeding and cleaning students; using therapy tools in inappropriate ways; and repeatedly verbally disparaging the students. Other than Ms. O'Neill herself, no one contradicted the testimony and observations of the two eyewitnesses to the charges: Teacher's Aides Anderson and Cooke. Ms. O'Neill's defense was to discredit these aides by asserting they were uneducated in the science of special education, that they misconstrued what they had observed, and that they were overly sensitive and protective of the students. In her defense, Ms. O'Neill proffered the testimony of individuals who are personal friends or fellow union representatives, but none of those persons spent any significant time in Ms. O'Neill's classroom in 2007-08. All testified about her behavior in years past, but none witnessed what happened in the classroom from October 2007 through January 2008.

Ms. O'Neill testified that "tapping" students in response to wrong answers or to get their attention had been a recognized, laudatory teaching technique. Yet, it is telling that

no professional from outside her classroom, save one, ever saw her use it, and all testified that it was the wrong thing to do.¹³ Apparently, Ms. O'Neill abstained when other professionals were present, and the reason she abstained was because she knew it was wrong.

One need not have an advanced degree to understand the impropriety of hitting a profoundly handicapped child in the head, either to get their attention or to emphasize that an answer they have given was incorrect. One does not need special training to distinguish between a friendly tap on the shoulder and a harder hit to the head. Ms. O'Neill minimized the severity of the blows by calling them "taps" rather than "hits." Ms. Anderson and Ms. Cooke testified that they were not simply "taps," and Ms. O'Neill admitted that they were sometimes calculated to inflict a degree of discomfort, to engender anticipation of the impact and, thereby, to modify the student's conduct to avert that consequence. None of this resulted in the permanent injury of a student, but the District need not have waited for such injury to occur before taking action.

As Ms. Anderson and Ms. Cooke testified, she committed other acts of roughness and cold callousness, including the retaliatory kicking of a student, pushing students, using excessive force when correcting or reprimanding them, and misapplying therapy tools. Her callous state of her mind was evidenced by the nasty, demeaning, and disparaging language she used to describe them: "retarded," a "waste of air," and referring to Olivia as "Oblivia" and to her mouth as looking "like a butthole." This was not an ill-advised attempt at humor; it was the symptom of an altered and pernicious attitude. Ms. O'Neill's behavior changed in 2007-08. Ms. Miers-Pandolfi and Ms. Longobardi described Ms. O'Neill as having become increasingly difficult in their attempts to schedule therapy, and Nurse Pillsbury and Ms. Shaw described her as having appeared to be "burned out."

Ms. O'Neill was found not guilty of felony child abuse in a criminal case brought against her on the same charges. The standard of proof in that case was proof beyond a reasonable doubt. That is not the standard that pertains in this arbitration. Ms. O'Neill's behavior over the four-month interval from October 2007 through January 2008 constituted a violation of her duties as an educator. Her misconduct was not an isolated

¹³ Speech Pathologist Theresa Miers-Pandolfi; Principal Baus (who testified that such hitting would be "absolutely inappropriate"); Occupational Therapist Elaine Longobardi; Physical Therapist Shirley Shaw; and Physical Therapist Linda Frease.

incident. It was a series of misbehaviors undertaken over an extended period of time, and included both wrongful physical actions and disparaging verbal statements. The extensiveness of Ms. O'Neill's misconduct justified skipping the steps of progressive discipline and warranted the termination of her employment.

The students who were in Ms. O'Neill's class are among the most profoundly disabled students in the school district. They could neither defend nor even speak for themselves. Ms. O'Neill betrayed the trust placed in her to teach and care for them in a kind, loving, and professional manner. Instead, she displayed repeated callous and rough behavior. The District's Superintendent had just cause to discharge: Ms. O'Neill was "burned out" and could no longer be entrusted with the custodianship of her students.

THE UNION'S POSITION

The District had the burden of proving, by a preponderance of the evidence, the factual allegations made in support of its allegations and that the allegations, if proven, were sufficient to warrant her discharge. Because the statute and rules cited for terminating Ms. O'Neill's employment were penal in nature, they must be construed in her favor. The District asserted that Ms. O'Neill was not eligible for the progressive discipline afforded by CBA Article XXV H.2. because her misconduct was a "flagrant violation" of her responsibilities as a teacher (one of the exceptions to the progressive discipline provision). The District has not proven the allegations contained in its PETITION, has failed to justify its noncompliance with the progressive discipline required by Article XXV H.2, and has thus failed to prove that there was just cause to terminate Ms. O'Neill's employment.

Learning disabled students, if given too much assistance, eventually develop "learned helplessness," meaning that they require others to assist them when the assistance is not needed. It has therefore been essential, although sometimes unpleasant to an outside observer, to allow the students to struggle. Ms. O'Neill's aides, Mss. Cooke and Anderson, had difficulty dealing with that reality. Ms. Cooke acknowledged that she did not like to be a disciplinarian. Although the TAs may have found Ms. O'Neill's methods to have been unorthodox, Ms. O'Neill's concern was with getting results. She worked "outside the box" to find ways for her students to progress. Other than Ms. Cooke and Ms. Anderson, no school staff members, teachers, therapists

or administrators who visited Ms. O'Neill's classroom claimed to have observed Ms. O'Neill treat her students inappropriately.

The PETITION charged Ms. O'Neill with the following regulatory and performance violations:

School Board Policy 5.30(II)(C),
 State Board of Education Rule 6B-1.006(3)(a),(b),(e),(f), and (g)
 general misconduct in office and
 insubordination.

The District has not presented sufficient evidence to establish that Ms. O'Neill engaged in misconduct constituting *just cause* for discharge, as *just cause* is defined in Section 1012.33(a) of the Florida Statutes, or that she committed "misconduct in office," as that term is defined in the Florida Administrative Code, Rule 6B-4.009 (3), *Criteria for Suspension and Dismissal*. The District has failed to specifically define what conduct SCHOOL BOARD POLICY 5.30(II)(C), STUDENT CONTROL, purports to have prohibited:

II. The teacher, other members of the instructional staff or bus driver shall assume such authority for the control and supervision of students as may be assigned by the principal or the principal's designated representative and shall keep good order in the classroom or other places when in charge of students.

...

C. Corporal punishment shall not be administered in the Sarasota County School System.

Florida Statutes, Section 1003.01(7) defines corporal punishment as:

"...the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rule. However, the term 'corporal punishment' does not include the use of such reasonable force by a teacher or principal as may be necessary for self-protection or to protect other students from disruptive students."

The conduct that SCHOOL BOARD POLICY 5.30(II) purports to prohibit is extremely similar to that described in Article XVIII(C) of the CBA for controlling disruptive students. The latter states, in relevant part,

ARTICLE XVIII – MAINTENANCE OF CLASSROOM DISCIPLINE

A. General Responsibility

While on duty, a teacher has a general responsibility and the right to control student behavior and a major responsibility for controlling the classroom environment of those students under his/her direct supervision. A teacher may at any time request the assistance of the Principal.

...

C. Disruptive Students

1. General Guidelines Regarding Physical Force

Consistent with Federal and State and School Board Rules, a teacher shall have the authority, while on duty, to come into physical contact with a student or students to the degree necessary for the express purpose of establishing or

maintaining control of students. Such physical contact shall not be construed to be corporal punishment.

The physical contact that Ms. O'Neill had with her students was for the purpose of their education and not for the purpose of maintaining control or discipline in her classroom. Thus, she cannot be deemed to have violated the SCHOOL BOARD POLICY against corporal punishment. Ms. O'Neill acknowledged that she would bop her students on their heads using her hand or available light objects, but testified that she did this in a playful manner, accompanied by a vocal "buzzer" sound when the students gave a wrong answer. This was not disciplinary. It was a way to make learning fun and, thereby, to maintain the students' attention. The bopping never caused her students injury, pain or even discomfort, and was never done out of anger or frustration. Because the SCHOOL BOARD POLICY neither defines what constitutes corporal punishment nor provides employees with sufficient notice of what conduct is being prohibited, the POLICY is unenforceable and should not constitute the basis for Ms. O'Neill's discipline.

The only incident that could even conceivably have been viewed as corporal punishment was the incident in the cafeteria with Taylor. While Ms. O'Neill admits that she did have physical contact with Taylor when she escorted him to the cafeteria time-out area, this was not discipline. She merely guided Taylor to time-out as part of a behavioral plan. The District did not present any reliable evidence that Ms. O'Neill's physical contact with Taylor, or with any of her students, was inappropriate or disciplinary. The preponderance of the evidence suggests that she used a "hands-on" approach with her students, but only to the level necessary for keeping them engaged.

The District further charged Ms. O'Neill with having violated Florida Administrative Code Rule 6B-1.006(3). The District must prove that a serious violation(s) of those provisions occurred and they were so serious as to have impaired Ms. O'Neill's effectiveness in the classroom.¹⁴ The District has not proven the charges for the reasons given below:

¹⁴ In Broward County Sch. Bd. v. Peering, DOAH Case No. 05-2842. (R.O. July 31, 2006) ruled that misconduct in office has three elements: "(1) a serious violation of a specific rule that (2) causes (3) an impairment of the employee's effectiveness in the school system." In the instant case, the District must prove not only that Ms. O'Neill engaged in serious misconduct in violation of the Code of Ethics and the Principles of Professional Conduct, but that the misconduct was so severe that it impaired her effectiveness in the school system.

Rule 6B-1.006 (3)**Obligation to the student requires that the individual:**

- (a) 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.

None of Ms. O'Neill's conduct was harmful to her students' learning. The record lacks any evidence that Ms. O'Neill caused any harm to her students' mental or physical health or their safety. The only incident alleged in which a student was arguably physically harmed was when Olivia tripped and hit her head on the floor. Ms. O'Neill was accused of intentionally causing this accident, but the evidence supports a finding that it was an accident. The ensuing medical documentation from the clinic visit established that Olivia had not been injured. Any allegation of improper conduct on the part of Ms. O'Neill is evidence of the ignorance or bias of the TAs Cooke and Anderson.

The act of "bopping" her students on the head did not inflict any pain and injury. Rather, the physical contact had a salutary affect of reinforcing Ms. O'Neill's verbal cues. The District presented no evidence that the technique caused any harm to the students' learning.

Similarly, Ms. O'Neill's attempts to determine the efficacy of the weighted blanket and body sock on Olivia were appropriate. Her efforts had the potential of doing Olivia some good; and did her no injury. The aides' assessments of the experiences were unreliable; they had no comprehension of the purpose of the therapeutic devices or the manner with which it they were to have been used.

Ms. O'Neill used the gait belt appropriately on Adam on October 22, 2007, and did not cause him any harm. Adam had a documented pre-existing injury to the back of his neck that morning; the injury was not caused by the gait belt. Physical Therapist Shirley Shaw testified that, presuming that Ms. O'Neill used the belt as she described, that use was reasonable and appropriate under the circumstances.

It was alleged that Ms. O'Neill was unnecessarily rough with Adam when cleaning out his mouth with a wash cloth, causing him to lose a tooth. Adam was seven years old at the time; the tooth he lost was a baby tooth; and Dr. Lackey furnished expert testimony that the tooth had been ready to come out.

Ms. O'Neill denies having kicked Adam, Olivia, or any other student in her care. She did, on one occasion, use her foot on Adam's buttocks, as a "distal prompt" to

motivate Adam to continue walking forward, but this is a "reasonable and acceptable technique" and was not conduct warranting discipline. (Quoting the Union's brief.) The incident was not expressly alleged in the PETITION, and therefore cannot serve as a basis for discipline.

Ms. O'Neill did not strike Tara in the head on January 29, 2008. Ms. O'Neill's position while feeding Tara would have precluded the "backhand" motion attributed to her. She simply tapped Tara on her head. The contact did not cause Tara's head to move, or cause Tara to whine, which is her normal response when someone touches her face. Even if, *arguendo*, the aides' testimony as to this incident were completely accurate, Tara could not have been injured by Ms. O'Neill.

Ms. O'Neill was charged with having pulled the skin off Tara's lip on several occasions, causing it to bleed. Ms. O'Neill testified that she did this only one time, several years before the allegations in this case. This was "a perfectly appropriate act of grooming" (quoting the Union's brief) that, even had it been inappropriate, occurred outside of the interval to which the charges pertained.

The evidentiary record also does not support the charges that Ms. O'Neill bent Tara's hands and pinched her thumb on several occasions. Ms. O'Neill testified that she would dry off Tara's thumb to prevent further injury from her thumb sucking.

Rule 6B-1.006 (3)

Obligation to the student requires that the individual:

(b) Shall not unreasonably restrain a student from independent action in pursuit of learning.

No evidence was presented to show that Ms. O'Neill had unreasonably restrained a student from independent action in pursuit of learning.

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

(g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

The sarcasm and humor that Ms. O'Neill employed in her classroom was "shop talk." It did not expose any student to "unnecessary embarrassment or

disparagement." Ms. Miers-Pandolfi and Ms. Shaw confirmed that sarcastic humor was an acceptable way for teachers and therapists of the profoundly mentally handicapped to cope with the tension inherent in the job. None of Ms. O'Neill's students comprehended the comments made, and no persons other than the teacher's aides and Nurse Pillsbury heard the comments. Ms. O'Neill did not intentionally expose her students to unnecessary embarrassment or disparagement. Nor did she fail to protect them from harassment or discrimination on the bases set forth in paragraph (g).

The District has not proven the misconduct charged, and has also not proven that Ms. O'Neill's effectiveness in the school system has been impaired. To the contrary, she is designated as a "highly qualified teacher" under No Child Left Behind; she has received only the highest ratings on all of her performance evaluations throughout her employment with the District; and many of her co-workers testified that she was a gifted and highly dedicated teacher. Ms. O'Neill is an effective teacher and is capable of returning to the classroom.

The PETITION charged Ms. O'Neill with "insubordination." Florida Statute, Section 1012.33[1](a) lists the types of misconduct that can serve as the basis of just cause for discipline. [See page 2 of this decision.] The list includes "gross insubordination." Insubordination that falls short of gross insubordination is not a basis for termination of an instructional employee. "Gross insubordination" is defined in the Florida Administrative Code, Rule 6B-4.009(4), *Criteria for Suspension and Dismissal*:

The basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36, Florida Statutes. The basis for each of such charges is hereby defined:

- (4) Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

Because the PETITION did not set forth the charge of **gross** insubordination, the District cannot now make that charge. And, if, *arguendo*, the District were not so precluded, then a single instance of insubordination, even if proven, would not have constituted **gross** insubordination and so would not have furnished just cause for termination. The charge of insubordination "must be dismissed from the PETITION." (Quoting the Union's brief.)

The foregoing notwithstanding, the charge of insubordination was likely based upon Principal Baus's purported verbal warning of October 23, 2007 – that Ms. O'Neill refrain from hitting her students. Principal Baus's testimony of this warning was

unconvincing for the following reasons. Despite having formerly served as a union representative, Ms. Baus testified that she did not, at the time, identify the instruction she gave Ms. O'Neill as having been a verbal warning, and did not document the alleged warning in writing. Nor did she give Ms. O'Neill notice that the meeting was of a disciplinary nature or that it could lead to discipline. She thereby denied Ms. O'Neill the opportunity to retain Union representation. Ms. Baus stated that she called the meeting with Ms. O'Neill based upon her conversation with Ms. Pillsbury, yet neither of the two incidents that Ms. Pillsbury reported to Ms. Baus – Ms. O'Neill's purported pushing of Olivia and use of the gait belt on Adam – had involved hitting. Ms. O'Neill testified that she had no recollection of having been warned not to hit her students.

Assuming that the charge of insubordination was premised upon Ms. O'Neill's use of objects to "bop" her students, those "bops" were not disciplinary in nature and were not administered in anger or frustration but, rather, were physical "prompts" that reinforced her verbal responses. If this was the "hitting" that Principal Baus was warning against, then she failed to put Ms. O'Neill on sufficient notice of the conduct she was prohibiting.

Given the number of individuals who entered Ms. O'Neill's classroom on a daily basis, without any advanced warning, it is improbable that the conduct described by the teacher's aides actually occurred. It is more reasonable to conclude that these two assistants misinterpreted the conduct of an educator trained and seasoned in working with the learning disabled. The preponderance of the evidence supports a finding that Ms. O'Neill did not engage in any inappropriate conduct with her students.

Article XXV(H)(2) of the CBA provides that "Except in cases that constitute a real immediate danger to the district or other **flagrant violation**," progressive discipline will pertain. Ms. O'Neill has never been disciplined for any misconduct. Termination of employment is not progressive or corrective, and is disproportionate to the degree of misconduct proved. The District alleged, in the PETITION, that Ms. O'Neill's conduct had constituted a "**flagrant violation** of her responsibilities as a teacher," but failed to identify what "responsibility as a teacher" she flagrantly violated. Without more information about this charge, Ms. O'Neill was unable to defend against it. (Arbitrator's emphases)

As for remedy, all charges in the PETITION should be dismissed and Ms. O'Neill reinstated to a substantially equivalent position with the District. In the alternative, if the Arbitrator finds that Ms. O'Neill engaged in misconduct warranting discipline, termination is too harsh a sanction under the circumstances. Ms. O'Neill has a high likelihood of

rehabilitation and is willing to attend any in-service or continuing education courses suggested by the District or the Arbitrator. If discipline is found to have been warranted, then Ms. O'Neill should be given a reprimand and be required to participate in continuing education.

DECISION

The arbitrator's authority derives from solely the collective bargaining agreement. His role is to apply the terms of the Agreement. Article XXIII of this Agreement, GRIEVANCE AND ARBITRATION, states in Section C.5:

"The arbitrator shall have no power to add to, subtract from, modify, or alter the terms of this Agreement..."

Several provisions in Article XXV of the CBA – DISCIPLINARY ACTIONS – govern the administration of discipline. Sections A and H(1) require that discipline be issued for just cause, and Section B requires that discipline be governed by applicable statutes. The applicable statute – Section 1012.33[1](a) – is unspecific as to how degrees of misconduct relate to degrees of discipline. And it states that its list of what constitutes just cause is incomplete: just cause includes "but is not limited to" the types of misconduct listed: misconduct in office, immorality, incompetency, gross insubordination, willful neglect of duty, and any crime involving moral turpitude. Of the foregoing, the catch-all category is "misconduct in office," and the Florida Administrative Code, although not "statute," offers further explication as to what the term means. Rule 6B-4.009, *Criteria for Suspension and Dismissal*, states that "misconduct in office" consists of a violation of Administrative Code Rule 6B-1.006(3) that is "so serious as to impair the individual's effectiveness in the school system." Here, again, are the relevant professional obligations of 6B-1.006(3) that, if breached so severely that they impair the teacher's effectiveness, constitute just cause for termination under the charge "misconduct in office":

- (a) 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.
- (b) Shall not unreasonably restrain a student from independent action in pursuit of learning.
- ...
- (e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.
- (f) Shall not intentionally violate or deny a student's legal rights.
- (g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital

status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

And what makes a violation of (a) through (g) so serious that it will impair the individual's future effectiveness? That question is a school district's to answer, in each case, on a case-by-case basis.

Article XXV Section H(2) of the CBA further provides that, except in cases that constitute a "real immediate danger to the district" or "other flagrant violation," progressive discipline shall be administered. Progressive discipline means that an employee who engages in acts of misconduct of the same genera for which a single act does not warrant discharge will receive increasing severe discipline. The purpose of the progression is to dissuade the employee from recidivism, to encourage rehabilitation, to salvage the employee for the school district and, if all else fails, to ultimately rid the district of an unsalvageable employee. Progressive discipline requires, at a minimum, the timely notification of the employee of what she is doing wrong; the timely imposition of discipline, to chasten the employee and elicit a change in performance; and the timely warning that future recurrence will lead to increasingly severe discipline, including possible discharge. (The need for timeliness is explicitly set forth in Article XXV A(3).)

In the instant case, the Arbitrator will be examining the serial allegations against Ms. O'Neill and the evidence in support of them to determine whether the discipline issued complied with the foregoing provisions of the CBA, statute and regulations. Again, the School District bore the burden of proof.

October 23, 2007

On October 23, 2007, Principal Baus called Ms. O'Neill into her office and spoke to her about two charges: that Ms. O'Neill had pushed Olivia to the floor on October 12, 2009 and, on October 22, 2007, had repeatedly dropped Adam to the floor while he was in the gait belt. Although either allegation, if found to have been true by Principal Baus, might have subjected Ms. O'Neill to severe discipline, Ms. Baus did not advise Ms. O'Neill that the purpose of the meeting was disciplinary.¹⁵ Ms. O'Neill was therefore not alerted to invoke her *Weingarten* rights to have Union representation.

¹⁵ Principal Baus's explanation of why she did not tell Ms. O'Neill of the disciplinary purpose of the meeting was both self-contradictory and irrelevant. She testified both that she had been certain that Ms. O'Neill would have a valid explanation for what had been reported, and that she was not a hundred percent sure that Ms. O'Neill had not hit Olivia. Regardless of her reasoning, the purpose of the meeting was disciplinary, but was not identified as such to Ms. O'Neill.

Following the October 23rd meeting, no new evidence was developed regarding either incident. But the October 12th and 22nd incidents were subsequently cited in the PETITION. The Arbitrator observes that, if the allegations of these incidents had been sufficiently credible that, in Ms. Baus's mind, they had warranted the imposition of discipline, then that discipline should have been issued immediately after October 23, 2007.¹⁶ Principal Baus's inaction evidences her conclusion that either the allegations were not credible, or that the incidents had taken place but had not warranted discipline.

As for the purported verbal warning not to hit, hurt, or treat students roughly in any way (which the District casts as having been the first step in progressive discipline), the things said by Principal Baus to Ms. O'Neill at the October 23rd meeting did not constitute a "verbal warning" within the meaning of Article XXV Section H(2) of the CBA. At a minimum, progressive discipline required that a verbal reprimand – identified as such – notify Ms. O'Neill of what she had done wrong, and that a written notification of the warning have been placed in her file. Had these things been done – had it been made clear to Ms. O'Neil that she was being issued discipline – Ms. O'Neill would have been afforded the opportunity to have grieved the matter.¹⁷ And had Principal Baus issued Ms. O'Neill an explicit verbal warning – the first discipline Ms. O'Neill would have received in her career – she might thereafter have been more circumspect in her physicality. Instead, as far as Ms. O'Neill could tell, on October 23rd, Principal Baus was sharing friendly advice.

Acts of misconduct that would otherwise be subject to progressive discipline cannot be silently allowed to aggregate until they are sufficient in number to support a claim of just cause for discharge. Such inaction defeats the rehabilitative purpose of progressive discipline, and vitiates its contractual benefit. For that reason, and because she was denied her *Weingarten* rights on October 23, 2007, the Arbitrator finds that the citation of the October 12th and 22nd incidents as cause for discharge in the PETITION was improper.

While a system of progressive discipline does not permit events of alleged misconduct to be silently aggregated, nor does such aggregation render the misconduct

16 As noted above, Article XXV, DISCIPLINARY ACTIONS, states in section A.3. that "All facts pertaining to a disciplinary action shall be developed as promptly as possible. Actions under this Article shall be promptly initiated after all the facts have been made known to the official responsible for taking the actions."

17 Article XXV, disciplinary actions, Section C: "A teacher against whom disciplinary action is to be taken may appeal the proposed action through the grievance procedure."

immune to discipline. However, it does render recidivistic misconduct immune to the increased penalty that would normally be associated with progressive discipline. For example, the commission of two acts of similar misconduct, either of which would intrinsically warrant suspension, would normally receive progressively more severe discipline under Article XXV H(2) of the CBA, due to their repetition: the first act would result in suspension and the second act in dismissal. But where the notice and timeliness elements of progressive discipline have been withheld and the employee has thus been denied the opportunity to demonstrate reformation of her conduct, progressively harsher discipline for recidivism is inapt. The discipline appropriate for each purported act of misconduct must then be judged by the intrinsic impropriety or malevolence of the act.

Of course, the progressive discipline provisions of Article XXV would not have applied to Ms. O'Neill if the District had shown that her conduct on October 12th or 23rd had constituted a "real immediate danger to the district" or "other flagrant violation."¹⁸ But the sanguinity of Principal Baus's response on October 23rd precludes the conclusion that it was either. Principal Baus testified that her intention had been to issue a verbal warning for both alleged incidents.¹⁹

Principal Baus acted with timeliness when she was informed of Mss. Cooke's and Anderson's accusations on January 29, 2008. However, her delay in learning of the intervening acts of alleged impropriety was attributable, in large measure, to the District's failure to diligently comply with the CBA. Although Principal Baus suspected that Ms. O'Neill had been abusing her students, she did not instruct Mss. Cooke and Anderson to immediately report any incidents of further abuse to her; nor did she ask Nurse Pillsbury to convey comparable instructions to the aides. The failure to adequately monitor Ms. O'Neill and to timely bring charges when they might have been warranted and might have caused Ms. O'Neill to become more circumspect was the District's. That failure did not vitiate Ms. O'Neill's right to progressive discipline, as prescribed in Article XXV of the CBA.

The Arbitrator will now examine the remaining charges against Ms. O'Neill to determine whether the factual allegations have been proven, whether discipline was timely administered, and whether the discipline was reasonably proportionate to the

18 These are the exclusions set forth in Article XXV H(2).

19 Principal Baus testified that she had intended to have issued Ms. O'Neill a verbal warning. Notwithstanding that she issued the discipline imperfectly, disciplinary action was taken. The same offenses could not thereafter be subject to further discipline.

severity of the infraction. Because the evidence consists of the testimony of, primarily, teacher's aides Cooke and Anderson and of Ms. O'Neill, their respective credibility will first be assessed. In general, the Arbitrator finds that the testimony of Mss. Cooke and Anderson was truthful, albeit that their judgment as to their perceived harshness and persistence of Ms. O'Neill's methods may have been colored by their empathy for her students. The Arbitrator finds the testimony of Ms. O'Neill to have been credible in general, but implausible as to some specific and crucial elements, when her testimony was self-serving and implausible. Those elements of her testimony and the reasons that the Arbitrator found them to have been implausible will be identified and explained.

The loss of Adam's tooth

The loss of Adam's tooth was offered as *prima facie* proof that Ms. O'Neill had pulled too harshly on the washcloth that Adam had clenched in his teeth. The testimony of Ms. O'Neill's dentist that the tooth was ready to come out was credible. The Arbitrator finds that the District has not sustained its burden of proving that the loss of the tooth was due to Ms. O'Neill's application of unreasonable force to the washcloth.

Bopping students on the head

The evidence that this practice was wrong, and that Ms. O'Neill knew that it was wrong, resides with the testimony of Occupational Therapist Elaine Longobardi and with the fact that, when other professionals visited her classroom, Ms. O'Neill refrained from "bopping" students. However, there is no evidence that her "bopping" inflicted any pain or injury, or that it was done for any reason other than to focus the students' attention. The appropriate discipline, if timely administered, should not have exceeded a written reprimand.

Various sarcastic and demeaning comments intended as humor

The Arbitrator takes judicial notice that, in professions where the demands of constant vigilance and timely intervention are unrelenting, the level of stress is high and humor is essential in coping with it. Some of the darkest humor exists in professions where the stress is the greatest. The District has not shown that any of Ms. O'Neill's comments were intended to have been heard and comprehended by persons other than the two TAs and Nurse Pillsbury. The Arbitrator finds that her humor and observations furnished no basis for discipline.

Pulling Olivia's hands from her mouth, and Tara's thumb from hers

The testimony of Mss. Cook and Ms. Anderson, respectively, that Ms. O'Neill pulled Olivia's hands from her mouth harshly, or pushed them in further, or that she pulled Tara's thumb from her mouth harshly is credible, but unquantifiable. It was obviously not improper for Ms. O'Neill to remove Olivia's hands or Tara's thumb from their respective mouths. And, depending on the vigor with which she removed Olivia's hands, it might have appeared that she was pushing them further in. The evidence is inadequate for the Arbitrator to determine that Ms. O'Neill had used undue force and, because the District bears the burden of proof, the Arbitrator finds the allegations to be unproven.

Urging Adam forward by pushing her foot against his buttocks

Therapists Shaw and Longobardi testified about the inappropriateness of this act, and common sense says that it was wrong. Ms. O'Neill's attempt to put a gloss of legitimacy on it by describing it in technical jargon, as a "distal prompt," is unpersuasive and compromises her credibility. Because the act was callous but not malicious or injurious, the Arbitrator finds that the appropriate discipline, if timely administered, should not have exceeded a written reprimand.

Pulling the skin off Tara's lip

Ms. O'Neill testified that she did this because the dead skin was a "negative attention getter" and she wanted Tara to be seen "in the best light." She also testified that she pulled the skin off because it "bugged" her to see it. And she euphemized the act. She did not tear the skin off. She testified that she "popped" it off.

Neither Tara's mother nor the school nurse had authorized the removal of the skin. There is no evidence that it served any health purpose. There is evidence that it may have caused Tara pain. Ms. O'Neill testified that she did not pull the skin off during the interval covered by the petition. The Arbitrator finds the testimony of Mss. Cooke and Anderson to the contrary to be the more credible, because it is the more disinterested and because of the unlikelihood that they would have invented their observations of the act. The Arbitrator finds that the appropriate discipline, if timely administered, would not have exceeded a one-week suspension without pay.

Causing Tara's gums to bleed during feeding

The Arbitrator credits the testimony of speech language pathologist Theresa Miers-Pandolfi, that feeding should not have caused Tara's gums to bleed. The Arbitrator notes that, although there were professionals whom the Union could have called to

support Ms. O'Neill's medical claims as to the cause of the bleeding – her dentist or Nurse Pillsbury – no such testimony was proffered. This raises the question of why Ms. O'Neill had not sought medical advice when the bleeding had regularly occurred. The Arbitrator finds Ms. O'Neill's indifference to the bleeding constituted a callous disregard of Tara's welfare, and warranted discipline. The Arbitrator finds that the appropriate discipline, if timely administered for the first event of gum bleeding, would not have exceeded a one-week suspension without pay. However, because (1) timely discipline might have prevented recurrence and (2) the District has not proven the number of incidents of gum bleeding beyond the first, the Arbitrator find that the District has not proven what further discipline, if any, would have been warranted.

Kicking Olivia under the cafeteria table and her desk

The testimony of Mss. Cooke and Anderson diverge on whether they could see Ms. O'Neill's foot make contact with Olivia. The former testified that the table and desk had blocked her view, which calls into question how Ms. Anderson saw what she saw, and whether impact occurred. Ms. O'Neill denies having actually kicked Olivia and, the testimony of the witnesses being conflicting, the Arbitrator finds the accusation to be unproven.

Wrapping Olivia in the weighted blanket and the body sock

These therapies were legitimate, and might have been efficacious. The only way to have known was to have tried. The Arbitrator finds that the District has failed to show that either attempt was carried out for other than Olivia's welfare, and that, given the discretion that was afforded Ms. O'Neill in her classroom, neither attempt should have subjected her to discipline.

The restraint of Taylor

Taylor was capable of vigorous resistance. The testimony of Ms. Anderson alone as to the manner in which Ms. O'Neill restrained him was insufficient for the Arbitrator to determine that the force of method used was excessive. The Arbitrator finds no grounds for discipline.

The backhanded slap to Tara's head

Both Ms. Anderson and Ms. Cooke testified that they saw Ms. O'Neill, in exasperation, forcefully strike the side of Tara's head with the back of her hand. The Arbitrator finds their testimony to have been credible. The contrary testimony by Ms. O'Neill presents a different take on the same scenario, suggesting that Mss. Anderson

and Cooke had misconstrued what they had seen. The Arbitrator finds Ms. O'Neill's account to have not been credible.

Normally, hitting a student in this manner would be grounds for termination of a teacher's employment, because it would normally constitute misconduct in office so serious as to impair the teacher's effectiveness in the school system. In this case, the mitigating factor of Ms. O'Neill's 18 years of service to the District, in a job that would grind most educators down, must be taken into account. So must another important factor.

On October 23, 2007, Ms. Baus was alerted about the vigor of Ms. O'Neill's student interactions. Ms. Baus thereafter tacitly relinquished the responsibility for monitoring Ms. O'Neill's classroom to TAs Cooke and Anderson, without explicitly telling them she was doing so and without furnishing them with guidance as to when or how to timely communicate their observations. As noted, when asked whether Ms. O'Neill's actions had been serious enough to overcome her concern about talking to Principal Baus, Ms. Cooke said, "No, I guess not." A portion of the culpability for the consequences of the free reign given to Ms. O'Neill thus resided with the two TAs and with Principal Baus. The utility of progressive discipline to the employer is that it can intercede to stop misconduct when the stakes are still small. That opportunity was missed here, to the disadvantage of Ms. O'Neill, the District and, especially, the students in Ms. O'Neill's class. It is true that Ms. O'Neill committed insubordination because she hit, hurt and treated students — especially Tara — roughly in ways unrelated to the learning process. It is also true that a contributing factor to her pattern of abuse was the failure of the District to monitor, intercede, and timely apply progressive discipline when needed.

AWARD

The purpose of this decision was to determine whether Ms. O'Neill's discharge was issued in conformity with the terms of the collective bargaining agreement. For the reasons set forth above, the Arbitrator finds that it was not, and sustains the grievance.

As remedy, the Arbitrator directs that the termination of employment be reduced to the following:

- a written reprimand for bopping students on the head with various objects;
- another written reprimand for using her foot to push Adam on the buttocks;
- a one-week suspension for pulling the skin off Tara's lip;
- a one-week suspension for causing Tara's gums to bleed during feeding; and
- a two-week suspension for striking Tara on the head.

The suspensions, aggregating 4 weeks, shall run sequentially and be without pay. Additionally, Ms. O'Neill shall submit to such counseling as the District deems warranted. The termination shall be expunged from Ms. O'Neill's personnel file, and she shall be restored to her prior teaching position or an equivalent position.

Pending the issuance of the arbitration decision, Ms. O'Neill was maintained on-salary by the District, so a monetary make-whole remedy is not required.



Mark I. Lurie, Arbitrator

August 30, 2009