STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

IN THE MATTER OF:	**Docket No.: 19-008004**
Kendra Nichols, **Petitioner**	**Case No.: 19-7**
	Agency: Education
v	
Bay City Public Schools, **Respondent**	**Case Type: ED Teacher Tenure**
	Filing Type: Appeal

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Issued and entered
this 9th day of September 2019
by: Eric J. Feldman
Administrative Law Judge

PRELIMINARY DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE

PROCEDURAL HISTORY

By letter dated February 25, 2019, Stephen C. Bigelow, Ph.D., Superintendent of Schools (Superintendent) of Bay City Public Schools (District/Respondent/Appellee), charged Kendra Nichols (Petitioner/Appellant), a tenured teacher, with six (6) charges. The charges are contained in 14 numbered pages. The charges requested that Petitioner be discharged from her employment with Respondent. On February 25, 2019, the Board of Education of Bay City Public Schools (Board) met and considered the charges. The Board approved the charges and the request to terminate Petitioner's employment. The charges as well as the Board action on the charges were sent to Petitioner and received by Petitioner on March 5, 2019.

On March 21, 2019, Attorney Jeffrey S. Donahue, on behalf of Petitioner, filed an Appearance, a Notice of Appeal, and a Claim of Appeal, with the State Tenure Commission (Commission). He also served a copy of these documents to the Board.

On March 25, 2019, Administrative Law Judge (ALJ) Michael J. St. John sent both parties a Notice of Prehearing Conference by Telephone, which scheduled a prehearing conference for April 10, 2019.

On March 28, 2019, Attorneys Robert A. Dietzel and Jennifer K. Starlin, on behalf of Respondent, filed their Appearance.

On March 28, 2019, Administrative Law Manager Lauren G. Van Steel issued an Order Reassigning Case from ALJ St. John to the undersigned ALJ, Eric J. Feldman.

On April 1, 2019, Respondent's attorneys filed an Answer to the Claim of Appeal.

On April 10, 2019, a prehearing conference was convened by the undersigned via teleconference. On April 11, 2019, the undersigned issued an Order Following Prehearing Conference and Notice of Hearing (Order). The Order informed both parties that the hearing would be held June 4-7, 2019.

On May 21, 2019, Petitioner's attorneys filed Petitioner's Witness and Exhibit List.

On May 21, 2019, both parties executed a Stipulation to Extend Deadline for witness and exhibit lists to May 24, 2019.

On May 22, 2019, the undersigned issued an Order Granting Request to Extend the Deadline for Filing of Witness and Exhibit Lists to May 24, 2019.

On May 24, 2019, Petitioner and Respondent filed its Witness and Exhibit List.

On May 29, 2019, Petitioner's attorney requested Subpoenas. On May 31, 2019, MOAHR sent Petitioner the requested Subpoenas.

On June 4-7, 2019, the hearing convened as scheduled by the undersigned, located in Bay City, Michigan. Attorneys Jeffrey Donahue and Aubree Kugler appeared on behalf of Petitioner. Petitioner was also present for the hearing. Attorneys Robert Dietzel and Jennifer Starlin appeared on behalf of Respondent. Jennifer Grigg, Director of Human Resources and New Employee Relations, was also present for Respondent.

At the conclusion of the hearing, the undersigned allowed both parties to submit post-hearing briefs. On June 10, 2019, the undersigned issued an Order Following Hearing and Setting Briefing Schedule. On July 17, 2019, both parties submitted their briefs summarizing their respective positions. On July 26, 2019, both parties submitted their replies to the other party's briefs. On July 26, 2019, the record was closed.

WITNESS LIST

The following individuals testified at the hearing:

1. Kendra Nichols, Petitioner[1]
2. Jessica Brunsell, Special Education Supervisor for the Bay Arenac Intermediate School District (Bay Arenac ISD), but assigned to Bay City Public School's (District/Respondent) as the Special Education Director
3. Thad Van Tifflin, Educational Assistant at Linsday Elementary School (Linsday) with the District
4. Jacob Garcia, School Service Worker at Linsday with the District
5. Casey Phelps, Principal of Linsday with the District
6. Elizabeth Garchow, Educational Assistant of Linsday with the District
7. Megan Appold, Human Resources Manager with the District
8. Tammy Krevinghaus, Behavior Intervention Specialist with Bay Arenac ISD
9. Katie Ries, Speech Language Pathologist with Bay Arenac ISD
10. Jennifer Grigg, Director of Human Resources and New Employee Relations with the District
11. Kevin McCann, Educational Assistant of Linsday with the District
12. Anajenette Wojciechowski, Former Educational Assistant of Linsday with the District
13. Janet Klida, Former Educational Assistant of Linsday with the District
14. Lesli Becker, Teacher at Kolb Elementary School (Kolb) with the District
15. Jessica Provoast, Employed at Bay Arenac ISD, but previously employed at Linsday with the District

[1] Petitioner was called as an adverse witness as well by Respondent. [Tr. Vol. I, p. 20.]

EXHIBIT LIST

The following exhibits were offered on behalf of Petitioner and admitted into the record unless otherwise indicated:

1. Petitioner Exhibit 1 is a photograph of Petitioner.
2. Petitioner Exhibit 2 is her Performance Evaluation for the 2008-2009 school year.
3. Petitioner Exhibit 3 is her Performance Evaluation for the 2009-2010 school year.
4. Petitioner Exhibit 4 is her Performance Evaluation for the 2010-2011 school year.
5. Petitioner Exhibit 5 is her Performance Evaluation for the 2011-2012 school year.
6. Petitioner Exhibit 6 is her Performance Evaluation for the 2012-2013 school year.
7. Petitioner Exhibit 7 is her Performance Evaluation for the 2013-2014 school year.
8. Petitioner Exhibit 8 is her Performance Evaluation for the 2014-2015 school year.
9. Petitioner Exhibit 9 is her Performance Evaluation for the 2015-2016 school year.
10. Petitioner Exhibit 10 is her Performance Evaluation for the 2016-2017 school year.
11. Petitioner Exhibit 11 is her Performance Evaluation for the 2017-2018 school year.

The following exhibits were offered on behalf of Respondent and admitted into the record unless otherwise indicated:

1. Respondent Exhibit A is Student A's[2] Emergency Seclusion Documentation Form, dated December 10, 2018, and other behavior interventional plan notes.
2. Respondent Exhibit B is Student B's[3] Emergency Seclusion Documentation Form, dated December 10 and 12, 2018, and Behavior Interventional Plan Notes.[4]

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[2] Student A refers to the minor child known as "M.C." "Student A" will be used in place of the child's name to protect the minor child's identity.
[3] Student B refers to the minor child known as "C.J." "Student B" will be used in place of the child's name to protect the minor child's identity.
[4] Two pages from Exhibit B were removed, which were pages 8 and 9 of the Recovery Room-Seclusion document, dated December 12, 2018.

3. Respondent Exhibit C are Individualized Education Programs (IEPs) for Student A, dated November 13, 2018, and Student B, dated April 11, 2018.

4. Respondent Exhibit D are Functional Behavioral Assessment and Positive Behavior Support Plans for Student A, dated September 20, 2018, and Student B, dated March 20, 2018.

5. Respondent Exhibit E was not offered.

6. Respondent Exhibit F is an Amended Spreadsheet of Seclusion incidents.[5]

7. Respondent Exhibit G is the Crossroads Manual.

8. Respondent Exhibit H is an e-mail from Ms. Brunsell to Ms. Grigg, dated November 30, 2018.

9. Respondent Exhibit I are photos of staff communications (text messages) regarding Petitioner's behavior.

10. Respondent Exhibit J are photos of Petitioner's classroom and area outside of classroom.

11. Respondent Exhibit K was not offered.

12. Respondent Exhibit L is the Bay Arenac Intermediate School District (Bay Arenac) Fall Conference 2017 manual.[6]

13. Respondent Exhibit M is Seclusion and Restraint Awareness Training materials.

14. Respondent Exhibit N is the District's sign-in sheet for Bay Arenac Fall Conference.

15. Respondent Exhibit O is the Professional Development sign-in logs/attendee lists.

16. Respondent Exhibit P is the Michigan Professional Educator's Code of Ethics.

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[5] Exhibit F was admitted over Petitioner's relevance objection. This document is admissible under MCL 24.275. Of note, the original contents of Exhibit F was not admitted based on Petitioner's relevance objection. In a separate record, Respondent made an Offer of Proof for the original contents of Exhibit F. [Tr. Vol. II pp. 433-434.]

[6] Exhibit L was admitted over Petitioner's relevance objection. This document is admissible under MCL 24.275.

17. Respondent Exhibit Q is the Board Policies referenced in the tenure charges.

18. Respondent Exhibit R is the Board policy on Student Seclusion and Restraint adopted on August 23, 2017.

19. Respondent Exhibit S are photos of Petitioner's planner from August 2018 to December 2018.

20. Respondent Exhibit T was not offered.

21. Respondent Exhibit U is a Memorandum from Deb VanSumeren, Principal of Linsday, to Petitioner, dated January 18, 2010, and a letter from Ms. VanSumeren to Petitioner, dated March 26, 2010.[7]

22. Respondent Exhibit V is a letter from Jill Ball, Principal of Linsday to Petitioner, dated October 10, 2016.[8]

23. Respondent Exhibit W is an e-mail from Mary E. Rapin Laures, Director of Special Education from the District, to other school recipients, including Petitioner, dated June 11, 2015, concerning Crossroads Training.[9]

24. Respondent Exhibit X is a Bay City Public Schools Request for Approval of Overload Assignment concerning Petitioner's Crossroads training, dated September 1, 2015; and 2015-2016 Crossroads sign-in sheet, dated August 19, 2015.[10]

25. Respondent Exhibit Y is an e-mail from Ms. Brunsell to Mary Jo Callaghan (with the Special Education Department of the District), dated October 9-10, 2018; and an e-mail from Ms. Callaghan to other school recipients, including Petitioner, dated October 11, 2018.

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[7] Exhibit U was admitted over Petitioner's relevance objection. This document is admissible under MCL 24.275.

[8] Exhibit V was admitted over Petitioner's relevance objection. This document is admissible under MCL 24.275.

[9] Exhibit W was objected by Petitioner because it was not on Respondent's exhibit list. After hearing both parties' argument, Exhibit W was placed under advisement. After thorough consideration, Exhibit W is admitted over Petitioner's objection. This document is admissible under MCL 24.275.

[10] Exhibit X was objected by Petitioner because it was not on Respondent's exhibit list. After hearing both parties' argument, Exhibit X was placed under advisement. After thorough consideration, Exhibit X is admitted over Petitioner's objection. This document is admissible under MCL 24.275.

The following exhibits were offered as joint exhibits by both Petitioner and Respondent:

1. Joint Exhibit 1 is a letter and a Certificate of Tenure concerning Petitioner, dated April 11, 2005.

2. Joint Exhibit 2 consist of the following: (i) letter from Carrie Sepeda, Secretary with the District, concerning that the Board voted to proceed on tenure charges, dated February 26, 2019; (ii) letter from Dr. Bigelow concerning proposed tenure charges of Petitioner, dated February 25, 2019; (iii) Board of Education Resolution to Proceed on Tenure Charges concerning Petitioner, dated February 25, 2019; (iv) the District's Student Seclusion and Restraint policy; and (v) the Teachers' Tenure Act.

3. Joint Exhibit 3 is Petitioner's Claim of Appeal, dated March 21, 2019.

ISSUE AND APPLICABLE LAW

Under the Teachers' Tenure Act (Act), a teacher may be discharged or demoted only for a reason that is not arbitrary or capricious. MCL 38.101. The United States Supreme Court has observed that the action of an administrative agency would normally be considered arbitrary and capricious if the agency relied on impermissible factors, failed to consider an important aspect of the problem, offered an explanation for its action that is counter to the evidence, or rendered a decision that is so implausible that it cannot be attributed to a difference in view or to agency expertise. *Motor Vehicle Manufacturers Association* v *State Farm Mutual Automobile Insurance Company*, 463 US 29, 43; 103 S Ct 2856; 77 L Ed 2d 443 (1983).

In the case of *Cona v Avondale School District* (11-61) the Commission discussed the arbitrary and capricious standard as follows:

> In *Garza and Lecznar v Taylor School District* (82-53), this Commission applied an "arbitrary and capricious" standard to review a management decision of a controlling board, citing the following Black's Law Dictionary definition of action that is arbitrary:
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> [F]ixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; ... without fair, solid, and substantial cause; ... without cause based on the law ... not governed by any fixed rules or standard. Black's Law Dictionary p 134 (Revised 4th Ed.) [citations omitted]

> A decision is arbitrary and capricious if it is based on whim or caprice and not on considered, principled reasoning. *Chrisdiana v Department of Community Health*, 278 Mich App 685, 692 (2008). Notwithstanding that the arbitrary or capricious standard of review is highly deferential, our review is not a mere formality and we are not required merely to rubber stamp the decision of a controlling board. Our responsibility in this case is to review the quality and quantity of the evidence and to determine if the decision to discharge appellant is the result of a deliberate, principled reasoning process supported by evidence. If there is a reasoned explanation for the decision, based on the evidence, the decision is not arbitrary or capricious. *Williams v International Paper Company*, 227 F3d 706, 712 (CA 6, 2000); *Rochow v Life Insurance Company of North America*, 482 F3d 860, 865 (CA 6, 2007); *McDonald v Western-Southern Life Insurance Company*, 347 F3d 161 (CA 6, 2003). If a controlling board overlooked important evidence or erred in appreciating the significance of evidence, its decision may be determined to be arbitrary or capricious. *Pokratz*, supra.

The Commission has held that it is their responsibility to review the quality and quantity of the evidence and to determine if the decision to discharge appellant is the result of a deliberate, principled reasoning process supported by evidence.

When the Legislature amended the Act, it was well aware that in the event that the teacher contested the charges against him or her, the district would be required to prove the charges by a preponderance of the evidence. *Luther v Board of Education of Alpena Public Schools,* 62 Mich App 32 (1975). The Legislature did not change which party bears the burden of proof or the quantum of proof required to meet the threshold to discharge or demote a teacher. *Craig v Larson,* 432 Mich 346, 352 (1989). Therefore, the district bears the burden of proof to establish its case by a preponderance of the evidence.

A "preponderance" means that evidence which, when weighed with that opposed to it, has more convincing force resulting in a greater probability that the alleged misconduct occurred. See *Thomas v Miller*, 202 Mich 43 (1918); *Giddings v Saginaw Township Community Schools Board of Education* (92-1).

Based upon the foregoing, the issue in this case is whether the Board established by a preponderance of the evidence that its discharge of Petitioner was not arbitrary or capricious.

FINDINGS OF FACT

Based on the entire record in this matter, including the testimony and admitted exhibits, the following findings of fact are established:

Petitioner's Background History

1. Petitioner is a tenured teacher with Bay City Public Schools[11] and has taught for Respondent for 17-years.[12] In a letter dated April 11, 2005, from Neil J. Kent, Director of Human Resources, the letter states that "[t]he enclosed card and certificate will identify you as a Tenure Teacher in the Bay City Public Schools [Respondent/District]." The Certificate of Tenure also identified that Petitioner achieved tenure status on April 11, 2005, with Respondent. [Jt. Exh. 1, pp. 1-2.]

2. Since 2004, Petitioner has taught in the elementary school program for emotionally impaired (EI) students at Linsday Elementary School (Linsday). [Tr. Vol. I, pp. 20-21.]

3. Petitioner received her bachelor's degree in elementary education with a specialization in special education and a minor in social studies in 2001. She received her master's degree in behavior and learning disorders in 2006. She is certified to teach elementary education grades K-5, special education grades K-8, and EI students K-12. [Tr. Vol. IV, p. 37.]

4. Petitioner began her career at Handy Middle School. She worked there for three years before being transferred to the EI room at Linsday in 2004. When Petitioner initially moved to Linsday, she was the only EI teacher, but due to the growth in the number students requiring EI services, the classroom was split into two on or about 2005. Since 2005, she has taught EI students in kindergarten through third grade. Another teacher teaches the fourth and fifth grade EI students. [Tr. Vol. I, pp. 20-21 and 234.]

5. Both classrooms are separated by a common hallway. Petitioner's room has a door to the hallway and the other classroom does not. In the hallway, there are four small seclusion or isolation rooms where students go for both time outs and for emergency seclusion. [Tr. Vol. I, p. 26; Tr. Vol. IV, p. 71; Resp. Exh. J, pp. 4-5.]

6. Respondent has provided Petitioner with training in the areas of crisis prevention and intervention (CPI) (e.g., de-escalation strategies and physical safe holds), seclusion and restraint training/law, and the Crossroads behavior intervention

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[11] Hereinafter referred to as "District" or "Respondent."

[12] Both parties also stipulated that Petitioner is a tenured teacher. [Jt. Exh. 1, pp. 1-2.]

program. She also became a trainer in a crisis prevention course called "Life Space Crisis Intervention" (LSCI), which was at the expense of Respondent. [Tr. Vol. I, pp. 30-35; Tr. Vol. IV, p. 134.]

7. Petitioner has consistently received satisfactory and/or effective ratings on her performance evaluations. [Pet. Exs. 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11.]

8. On January 18, 2010, Petitioner received a letter from the principal entitled "Fact-Finding Meeting Possibly Leading to Discipline," which addressed "[c]oncerns related to inappropriate use of time-out room doors will be discussed." On March 26, 2010, Petitioner received a letter from the principal entitled "Follow-Up to Fact-Finding Meeting," which stated an investigation was conducted, but results were inconclusive and no discipline was imposed against Petitioner. [Resp. Exh. U, pp. 1-2.]

9. On October 10, 2016, Petitioner received a letter from the principal informing Petitioner of certain points the principal wanted her to implement for Crossroads in the classroom. [Resp. Exh. V, p. 1.]

10. At the commencement of the 2018-2019 school year, Petitioner taught in the EI classroom for students in kindergarten through third grade at Linsday. During this school year, Petitioner had three different educational assistants that supported her classroom. Educational Assistant Elizabeth Garchow[13]was in the classroom full time, other than the first three days of the school year. Educational Assistants (EAs) Thad Van Tifflin[14] and Kevin McCann[15] split their time between Petitioner's classroom and the other EI classroom. Two EA's were always assigned to Petitioner's classroom. [Tr. Vol. I, pp. 21-25; Tr. Vol. II, p. 352-353.]

11. For the 2018-2019 school year, Petitioner's attendance was sporadic. She worked the first two weeks of the school year, then went on medical leave, until she came back approximately November 13, 2018. She then worked from November 13, 2018 to December 12, 2018. On December 12, 2018, Petitioner was placed on paid administrative leave because of the allegations against her. In total, she worked about 31-days for the 2018-2019 school year. [Tr. Vol. I, pp. 21-23 and 47; Tr. Vol. IV, p. 94.]

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[13] Ms. Garchow is employed with Respondent as an educational assistant. In 2011, she received her associate's degree in education. [Tr. Vol. II, pp. 352-353.]

[14] Mr. Van Tifflin is employed with Respondent as an educational assistant. In spring of 2018, he received his associate's degree in early childhood development. He is currently in a three-in-one program to get his bachelor's degree in early childhood education. [Tr. Vol. I, pp. 188-189 and 213-214.]

[15] Mr. McCann is employed with Respondent as an educational assistant. In 2015, he received his bachelor's degree in political science and history. [Tr. Vol. III, pp. 11-12.]

12. Jennifer Griff[16], Director of Human Resources and New Employee Relations, from Respondent's Human Resources Department, conducted the investigation against Petitioner. As part of the investigation process, Respondent interviewed Petitioner, with her two union representatives present, on January 17, 2019. At the conclusion of the investigation, Respondent concluded that Petitioner engaged in misconduct. [Tr. Vol. II, pp. 519 and 531.]

13. On February 25, 2019, Superintendent Bigelow filed tenure charges with the Board recommending that Petitioner's employment be terminated. On that same day, the Board met and considered the charges. The Board approved the charges and the request to terminate Petitioner's employment. The charges as well as the Board action on the charges were sent to Petitioner and received by Petitioner. [Jt. Exh. 2, pp. 1-50.]

14. On March 21, 2019, Petitioner timely appealed the Board's decision with the Board and the Commission. [Jt. Exh. 3, pp. 1-16.]

Allegations of Misconduct, Insubordination, and Dishonesty

15. The tenure charges alleged six specific charges of misconduct against Petitioner, with each charge containing multiple factual allegations. The charges were alleged as follows:

    a. Charge one was misconduct and insubordination: corporal punishment, assault, battery, and abuse of students;
    b. Charge two was misconduct and insubordination: disregard for seclusion and restraint laws, policy, and training;
    c. Charge three was misconduct: unprofessional and harmful conduct toward students;
    d. Charge four was unprofessional conduct and insubordination: intentional disregard for professional development opportunities;
    e. Charge five was misconduct, insubordination, and dishonesty: failure to implement Individualized Education Programs (IEPs) and Behavioral Intervention Plans (BIPs); and
    f. Charge six was insubordination and dishonesty.

    [Jt. Exh. 2, pp. 3-16.]

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[16] Ms. Griff is employed with Respondent as the Director of Human Resources and New Employee Relations. She has held this position since October 2018. In 2009, she obtained her bachelor's degree in psychology and business. In 2018, she obtained her master's degree in human resources administration. [Tr. Vol. II, pp. 502-503.]

Petitioner Treated Student's Inappropriately

16. During the 2018-2019 school year, there were multiple incidents of Petitioner acting inappropriately to EI students, which included the following:

    a. Ms. Garchow informed Petitioner that Student B said that he did not like Petitioner, to which Petitioner responded, "That's okay. I don't like him either." Petitioner's statement was said around the rest of the students in the classroom, but it was unclear if Student B heard it. [Tr. Vol. II, pp. 365-366.]

    b. Ms. Garchow asked Petitioner whether Student B had left the school building after eloping, to which Petitioner responded, "I hope he did so we can call the police and the po po can deal with him." Petitioner's statement was said around the rest of the students in the classroom. [Tr. Vol. II, p. 366.]

    c. Mr. Van Tifflin stated he heard Petitioner state to a student that if he continues to keep on acting like this, he would go to jail. [Tr. Vol. I, pp. 193-194.]

    d. Ms. Garchow and Petitioner were physically escorting Student A into the seclusion room because Student A had become physical. Ms. Garchow then let go of Student A to open the door to the seclusion room, when she then witnessed Petitioner placing her foot on Student A's butt and pushed him into the room while saying, "It's not CPI, but--[.]" [Tr. Vol. II, p. 373.]

    e. On December 12, 2018, Petitioner escalated Student B by unnecessarily getting into his space, resulting in a physical confrontation between them. [Tr. Vol. I, p. 200; Tr. Vol. II, pp. 378-789; Tr. Vol. III, p. 47.]

17. Multiple witnesses acknowledge that the interactions described in paragraph 16 were inappropriate. [Tr. Vol. I, pp. 203-204, 262, and 306; Tr. Vol. II, pp. 392-394, 481-484, and 531-532; Tr. Vol. III, pp. 48-50, 110-111, and 152; Tr. Vol. IV, p. 31.]

18. Mr. Van Tifflin and Ms. Garchow concluded that Petitioner treated Student B worse than his other classmates. An example includes when Petitioner directed Student B into the seclusion room after eloping from the room, even though Student B was already de-escalated and not a safety issue to himself or others. By Petitioner directing Student B into the seclusion room, this only re-escalated

Student B's behavior. [Tr. Vol. I, pp. 194-196; Tr. Vol. II, pp. 367-368 and 370-371.]

19. Petitioner also disfavored Student B because "she was much quicker to remove stamps or implement discipline for him than she was other students with the same behaviors." [Tr. Vol. II, p. 368.]

20. During the approximately 30-days Petitioner worked during the 2018-2019 school year, there are multiple instances of Petitioner being disrespectful to students in the EI room, including Students A and B.

Petitioner violated the Seclusion Requirements

21. "Seclusion" of a student versus a "time-out" and/or "break" of a student have different connotations. Seclusion occurs when a student is placed in a room to de-escalate and the door is closed. A "time-out" and/or "break" of a student means that a student can be placed in the same room where seclusion occurs, but the door remains open. [Tr. Vol. IV, p. 71.]

22. Respondent's staff, including Petitioner, received training on Michigan's seclusion and restraint law. [Tr. Vol. I, pp. 35-36; Tr. Vol. II, p. 506; Tr. Vol. III, pp. 45-46.]

23. On August 30, 2017, Petitioner attended a Professional Learning Conference 2018 (Conference). The Conference included training on Michigan's seclusion and restraint law. [Resp. Exh. L, pp. 1-55; Resp. Exh. M, pp. 1-25; Resp. Exh. N, p. 12; Tr. Vol. I, pp. 35-37.]

24. The Conference presented the following training materials concerning seclusion requirements:

    a. Elementary-aged students may not be secluded for longer than 15 minutes unless staff documents the reason for the extended seclusion and provide additional resources to help end the seclusion, including more or different staff;

    b. Seclusion may never be used as a form of discipline or punishment; and

    c. Students cannot be restrained or secluded unless there is an emergency situation where the student's behavior poses imminent risk to the student's safety or safety of others and requires immediate intervention.

[Resp. Exh. L, pp. 1-55; Resp. Exh. M, pp. 1-25.]

25. Petitioner is in charge of her EI classroom and she supervises the EA's, including providing them training, guidance, and directions. [Tr. Vol. I, pp. 27 and 193; Tr. Vol. IV, p. 114.]

26. Petitioner has brought student's back into the seclusion room as well as directed the EA's to so the same. However, the EA's never took a student into the seclusion room on their own decision. [Tr. Vol. IV, p. 72.]

27. Petitioner felt the EA's were not properly trained in seclusion, but did defer to her EA's to supervise the students when they were in the seclusion. [Tr. Vol. IV, pp. 72-73 and 115-116.]

28. On December 10, 2018, Petitioner and Ms. Garchow transferred Student A to a seclusion room. Ms. Garchow then let go of Student A to open the door to the seclusion room, when she then witnessed Petitioner placing her foot on Student A's butt and pushed him into the room while saying, "It's not CPI, but--[.]" Student A was then secluded for over two hours. Petitioner could not recall whether she checked on Student A during that time period. [Resp. Exh. A, pp. 1-6; Tr. Vol. I, pp. 68-69; Tr. Vol. II, p. 373; Tr. Vol. IV, pp. 117-118.]

29. An Emergency Seclusion and Emergency Restraint – Documentation Form (documentation form) was completed concerning this incident. The documentation form tracks what caused the seclusion, including a seclusion observation log. The documentation form states that Student A's behavior started based on his stamps being removed for poor behavior, resulting in his feet being on the chair unsafely. The documentation form further states that Student A refused to de-escalate, resulting in an emergency seclusion. The documentation form also states that the total time frame of the seclusion was 126 minutes in two sessions. [Resp. Exh. A, pp. 1-2.]

30. At the time of Student A's seclusion, he was approximately a 7 or 8 year old emotionally impaired (EI) student. The observation log noted the following during the seclusion: he refused to comply and was violent; ninja kicking door from across the room; the door was opened at times throughout the seclusion process to try to de-escalate him, but no avail; he was screaming, crying, rocking, and hitting his head on the wall; he told staff that he had to use the restroom, but he did not go to the bathroom; and when the seclusion ended, staff had to bring paper towels to clean up his salvia. [Resp. Exh. A, pp. 1-6; Tr. Vol. I, p. 92; Resp. Exh. C, pp. 1-15.] During that seclusion, Petitioner had done nothing to introduce new resources or staff to help alleviate the situation. [Tr. Vol. I, p. 69.]

31. During Student A's seclusion, Mr. Phelps also came at some point. He noted the following: (i) he attempted to de-escalate Student A to the point that the door could safely be opened again; and (ii) he reviewed the documentation form and was satisfied and did not see anything wrong with the way that the seclusion was handled. [Tr. Vol. II, pp. 338-341.]

32. On December 10, 2018, Student B was also secluded at the direction of Petitioner. Student B's total time in seclusion was 90 minutes. A document and an observation log was also completed regarding this incident. The documentation form indicated that the reason for the seclusion included Student B leaving the room, using inappropriate language to staff, physical aggression to staff, and preventing peers from learning [Resp. Exh. B, pp. 11-14; Tr. Vol. II, p. 343.]

33. At the time of Student B's seclusion, he was an 8 year old EI student. [Tr. Vol. I, p. 99; Resp. Exh. C, p. 16.] The observation log noted the following behaviors of Student B during the incident: he said "shut the fuck up nigger," "I'll kill you Mark," and "I'll kill you with my glock nigger"; he was kicking the door and punching the glass; and other foul language and hitting the door. There is no indication in the form that Petitioner had done anything to introduce new resources or staff to help alleviate the situation. [Resp. Exh. B, p. 13.]

34. Both of seclusions that occurred on December 10, 2018, were under Petitioner's watch. She did not ensure that either student received additional supports after 15 minutes of seclusion. She did review and initial the observation log forms describing each incident. She did not properly debrief with staff or report the concerns to administration.[17] [Resp. Exh. A, pp. 1-6; Resp. Exh. B, pp. 11-14; Tr. Vol. I, pp. 68-69 and 76-78; Tr. Vol. IV, pp. 92 and 119-120.]

35. Petitioner directed her EA's to place students, including Student B, in seclusion after they had already de-escalated. She also directed students to the seclusion even when they were not a safety risk. [Tr. Vol. I, pp. 194-195 and 229; Tr. Vol. II, pp. 370-372.]

36. Petitioner acknowledged that the seclusions were not consistent with her understanding of the seclusion requirements or with the training she received. [Tr. Vol. I, pp. 70, 77, and 88.]

37. Petitioner's actions on December 10, 2018, were not consistent with Michigan's seclusion requirements. [Resp. Exh. J, pp. 1-3.]

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[17] Petitioner noted that the principal was aware of Student B's seclusion, but she herself never contacted the principal reporting that the seclusion was longer than 15 minutes. [Tr. Vol. I, pp. 76-77.]

The December 12, 2018 Incident

38. On December 12, 2018, Student B became upset because he was required to work on an academic task. Student B then removed himself from the classroom area and went to a desk[18] in the hallway area where the seclusion rooms are located in order to de-escalate. Student B thereafter calmed down and began to work on his academic task, with the help of the EA's. [Tr. Vol. I, pp. 83-84 and 222-223; Tr. Vol. II, pp. 375-376.]

39. Student B subsequently completed his academic work. The EA's encouraged Student B to ask Petitioner for a snack because he completed his work. Petitioner came to the hallway area and EA Garchow explained to Petitioner that Student B is asking for a snack; however, Petitioner told Student B that he could not have the snack because of his behavior. Petitioner then left and closed the door between the desk and the classroom area. Student B got upset, opened the door, threw a crumbled paper at her, yelled and called her a "bitch", and then slammed the door. Student B never returned to the classroom area. [Tr. Vol. I, pp. 84 and 223-224; Tr. Vol. II, pp. 375-378.]

40. After Student B slammed the door, Petitioner came back to the seclusion area, got within a foot of Student B while he was sitting at desk and he called her a "nigger" and she replied, "[y]ou better look again, boy." All three EA's who witnessed the situation agreed that Petitioner should not have come back in the first place to Student B and that doing so escalated the situation. [Tr. Vol. I, p. 206; Tr. Vol. II, pp. 379 and 388; Tr. Vol. III, p. 47.]

41. At some point, a physical altercation occurred between Petitioner and Student B. EA's Mr. Van Tifflin and Ms. Garchow did not see how the physical altercation began; however, EA Mr. McCann did observe how it began. [Tr. Vol. I, p. 200; Tr. Vol. II, p. 408.] Mr. McCann was initially located at the other end of the hallway by the other EI room. [Tr. Vol. III, pp. 30-32.] Mr. McCann described the incident as follows:

> Then Ms. Nichols did come back to where he was sitting and was standing near him and they were both verbally fairly escalated. Student B went at her, her hair/neck area, grabbing it, pulling. Ms. Nichols grabbed his arms to try to get them off. They both fall over. The desk falls over also that he was standing near. She was on top of him and he's still got a hold on her. She's got a hold on his arms. She tries to get up, holding his arms back. She was able to get up. Then she pulled him into one of the seclusion rooms.

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[18] Any student could use this desk to de-escalate, but Student B often used this desk to de-escalate. [Tr. Vol. II, p. 377.]

[Tr. Vol. III, p. 32; See Tr. Vol. III, pp. 64-86.]

42. Mr. McCann stated he had a clear eyeshot of the event and that he did not see Petitioner push and/or bang Student B's head down into the floor. Mr. McCann further stated he did not hear an offer of help from the other EA's. [Tr. Vol. III, pp. 32-33.] However, the two EA's with the closest views, Mr. Van Tifflin and Ms. Garchow, consistently testified that Petitioner ended up on top of Student B, with her body straddling Student B's body, and with her hands holding Student B's head onto the ground. Petitioner pushed Student B's head into the floor at least three times. Student B was trying to fight Petitioner off of him. Petitioner then made the comment "I'll fucking drag you in here then[.]" She then stood up and grabbed Student B by his wrists with his butt and legs scraping on the floor and dragged him backwards into the seclusion room. Ms. Garchow reported the incident to Casey Phelps[19] (principal) via text message. [Tr. Vol. I, pp. 200-201 and 203; Tr. Vol. II, pp. 331 and 380-385; Resp. Exh. I, pp. 1-2.]

43. Petitioner claimed that she begged other staff members to intervene with Student B during the incident. However, Mr. Van Tifflin asked Petitioner two or three times to let him help her, but she said to Mr. Van Tifflin, "I've got this[.]" Ms. Garchow acknowledged that Mr. Van Tifflin asked Petitioner if she needed help. [Tr. Vol. I, pp. 93-94 and 201; Tr. Vol. II, pp. 380-381.]

44. During the altercation, Petitioner claimed that she was injured and provided a photograph showing a red mark on her neck. [Pet. Exh. 1, p. 1.] It was also indicated that that Student B's face was scratched during the altercation, but there was no photograph presented of Student B's face. [Tr. Vol. I, pp. 203, 225, and 300; Tr. Vol. II, pp. 388-389.]

45. Ms. Grigg was made aware that the principal took pictures of Petitioner's neck and he shared it with her on December 12, 2018. Ms. Grigg did not reference the picture in the tenure charges because she did not believe they were relevant. [Tr. Vol. II, pp. 541-542.]

46. Petitioner received extensive training on how to de-escalate tense student situations, including a summary of that training published on a poster that is hung on the wall immediately above where Student B sat. The poster reminds staff not to "pick up the rope," which meant that the District staff should not engage in a power struggle with a student. [Tr. Vol. I, p. 141; Resp. Exh. J, pp. 1-3.]

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[19] Mr. Phelps has been employed with the District for six years. In March 2018, he became the interim principal at Linsday, but permanently obtained the position in July or August 2018. In 2005, he obtained his bachelor's degree in physical education and health and he obtained his master's degree in principalship in 2015. He has an endorsement in history. [Tr. Vol. I, pp. 267-268.]

47. Petitioner's conduct of coming back to the classroom on December 12, 2018, and verbally engaging with Student B after he removed himself from the classroom area was inappropriate with Petitioner's de-escalation training. Staff agreed that she "picked up the rope" and engaged with Student B in a power struggle. [Tr. Vol. II, pp. 392-393; Tr. Vol. III, pp. 54-55 and 62.]

48. Petitioner received extensive training on crisis prevention and seclusion and restraint. [Tr. Vol. I, pp. 30-32 and 35; Tr. Vol. II, p. 506; Tr. Vol. II, pp. 45-46.]

49. Petitioner's conduct (regardless of how they got on the floor) of straddling Student B, restraining his head against the floor, pushing his head into the floor, and then physically dragging him by the wrists into the seclusion room, violated crisis prevention and seclusion and restraint training. [Tr. Vol. I, pp. 89, 203-204, 262; Tr. Vol. II, pp. 393-394 and 481; Tr. Vol. III, p. 152.]

Ineffective and Incommunicative Leadership concerning Crossroads

50. Respondent and Bay Arenac Intermediate School District (Bay Arenac ISD) use a behavior management system known as "Crossroads"[20] in their programs for EI students. The Crossroads Program Procedure Manual (Crossroads Manual) defines the program as follows:

> This system was designed to document and promote positive changes in student's behaviors. It operates like most typical behavior modification systems in that it has a continuum of behavior expectations, privileges, and consequences. Crossroads requires student/staff discussions to be about behaviors and not just about points or percentages. The benefits of this system have been the elimination of argument with students over points, unearned days, and percentages. Our discussions with students really focus on behavior, both acceptable and unacceptable, and help the student more easily distinguish between the two with an understanding that all behaviors are a choice.
>
> [Resp. Exh. G, pp. 1-3.]

51. In Crossroads, students are awarded stamps after each hour, lesson, or activity, based on their positive behavior. The more stamps the students receive, the more freedoms they have within the classroom, including the ability to use these stamps to purchase in the classroom store on Fridays. [Tr. Vol. I, pp. 109-110.]

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[20] Hereinafter referred to as "Crossroads" or the "Crossroads Program."

52. Petitioner has been provided copies and read the Crossroads Manual. On August 19, 2015, Petitioner attended a six-hour training on Crossroads, which was paid for by Respondent. [Resp. Exh. W, p. 1; Resp. Exh. X, pp. 1-3; Tr. Vol. I, p. 50; Tr. Vol. IV, pp. 46 and 131-137.]

53. In 2016, Kevin Gosson, the former special education director/supervisor, made it clear to Petitioner that he expected Petitioner to implement Crossroads in its entirety. On October 10, 2016, Principal Jill Ball, Petitioner's supervisor at the time, also made Petitioner aware in writing that she is expected to implement Crossroads. [Tr. Vol. IV, pp. 127 and 129; Resp. Exh. V, p. 1.]

54. During the past 13 years, there has been changes in management at the District. Linsday has had roughly seven principals and five special education directors. [Tr. Vol. IV, p. 33.] As Jessica Provoast[21] stated, "[t]he last few years there have been very confusing with very little training, and the frequent changing of principals and special ed directors have not helped the situation." [Tr. Vol. IV, p. 34.]

55. Petitioner and Ms. Provoast both used Crossroads in their respective classrooms for a number of years and both implemented the program in a similar manner. Ms. Provoast concluded that they were never instructed that they could not adapt or change the program. Over the last few years, Ms. Provoast concluded that they did receive feedback from the special education director about the implementation of the program, but never anything specific. [Tr. Vol. IV, pp. 12-14.]

56. Jessica Brunsell[22] is the Special Education Supervisor for the Bay Arenac ISD, but she is assigned to the District as the Special Education Director. She replaced Mr. Gosson for the 2018-2019 school year. [Tr. Vol. I, pp. 105, 110-112, 116, and 177.]

57. In August 2018, Ms. Brunsell decided that Crossroads was going to be used in both EI classrooms and had concerns about Petitioner's classroom. However, she did not arrange for training on the program until November 2018. [Tr. Vol. I, pp. 167-168.]

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[21] Ms. Provoast is currently employed at Bay Arenac ISD for her first year. She works at Linwood Elementary in the K through 3 EI self-contained classroom. Last year, she was employed with Respondent at Linsday in the upper elementary EI self-contained classroom. She was employed for 13-years at Linsday in the EI room. She taught adjacent to Petitioner's classroom. She obtained her bachelor's degree in teaching EI students with an emphasis on reading. [Tr. Vol. IV, pp. 6-8.]

[22] Ms. Brunsell received her bachelor's degree in biology and special education and her master's degree in principalship. She also received an approval for special education supervisor. [Tr. Vol. I, p. 104.]

58. For roughly two and a half months, there was no training provided to staff about Crossroads, despite Ms. Brunsell's concern. Ms. Brunsell only provided training to Heather Wheatcraft[23]and the EAs, and just hoped those individuals would model the program for Petitioner until she herself wanted to implement Crossroads. There was no evidence showing that Ms. Brunsell directed Petitioner to change the way she implemented Crossroads. Ms. Brunsell stated that Petitioner seemed "cold" to the idea of additional Crossroads training and she did not want to push Petitioner too hard. [Tr. Vol. I, pp. 117 and 158.]

59. In November 2018, Tammy Krevinghaus[24], the Crossroads trainer, came to Linsday to train Ms. Wheatcraft's room. Ms. Krevinghaus testified she did not train Petitioner's classroom because she did not feel "invited into" her classroom. [Tr. Vol. II, p. 456.] Mr. Phelps testified that he had concerns about how Crossroads was being run, but that he never addressed those concerns with Petitioner. [Tr. Vol. II, pp. 323-324.]

60. Ms. Brunsell testified that she attempted to talk to Petitioner about her concerns, but Petitioner ignored her. [Tr. Vol. I, p. 121.] Ms. Brunsell had many other opportunities to express her concerns to Petitioner via e-mail or phone, but chose not to. Ms. Brunsell had a responsibility to express any concerns to Petitioner about Crossroads. [Tr. Vol. I, pp. 121 and 171-172.]

61. Mr. McCann concluded that Petitioner only implemented approximately 50-60% of Crossroads. He did participate in the Bay Arenac ISD's training for Crossroads. However, he also testified that Petitioner was implementing the program "fairly close to what the Crossroads Program is." [Tr. Vol. III, p. 22.] Mr. McCann testified that under the Bay Arenac ISD's version of Crossroads, stamps can still be taken away for bad behavior, as Petitioner did, but now there is a focus on them earning them back. [Tr. Vol. III, pp. 50-52 and 63.]

62. Petitioner acknowledged that her application of the program was not perfect. For example, she ran the school store for Crossroads biweekly, rather than on a weekly basis. She credibly testified for this deviation was that she preferred to give students the "opportunity to earn enough money that they actually got to make a choice about what they were earning or what their reward was..." [Tr. Vol. IV, p. 54.]

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[23] Ms. Wheatcraft's classroom is adjacent to Petitioner's room and she is assigned to the EI classroom for the 4th and 5th grade students. [Tr. Vol. III, p. 12; Tr. Vol. II, p. 456.]

[24] Ms. Krevinghaus has been employed with Bay Arenac ISD for almost 30-years. She is currently a behavior intervention specialist and has been in this role for 9-years. She obtained her associate's degree in interpreting for the deaf, American Sign Language, she then obtained her bachelor's degree in psychology. [Tr. Vol. II, pp. 438-439.]

63. In November 2018, a meeting was held about Crossroads, but Petitioner did not stay for the whole meeting. [Tr. Vol. I, pp. 117-119; Tr. Vol. II, pp. 455-458.]

64. Respondent provided examples of how Petitioner failed to implement Crossroads properly, which included the following:

    a. She did not use stamps as a positive reward system, but only took stamps away for bad behavior. [Tr. Vol. I, pp. 54 and 210; Tr. Vol. II, pp. 360-363.]

    b. She indicated that she has been in the room long enough that she knew how to run it and did not need to follow anybody else. [Tr. Vol. II, p. 364.]

    c. She did not have meaningful conversation with students after each specific set amount of time or activities. [Tr. Vol. I, pp. 55-56.]

    d. She did not offer opportunities for student to earn "bonus stamps," resulting in the students' inability to move to the higher levels. [Tr. Vol. I, pp. 57-58 and 210; Tr. Vol. II, pp. 360-363.]

    e. She did not consistently operate the school store. [Tr. Vol. I, pp. 57 and 210; Tr. Vol. II, pp. 360-363.]

65. Current staff members, with personal knowledge, concluded that Petitioner did not operate Crossroads properly with the intent or purpose of the program. [Tr. Vol. I, pp. 110-115, 124, 155-156, and 210; Vol. II, pp. 360-363.]

66. Neither Ms. Brunsell, Ms. Krevinghaus, or Mr. Phelps followed up with Petitioner regarding Crossroads training or implementation.

67. There was no clear or reasonable directive from Respondent to Petitioner with regard to the implementation of Crossroads or training opportunities.

Petitioner's Implementation of Student IEPs and BIPs

68. "A behavior plan is essentially a plan for how the staff react when a student behavior occurs...it's broken down into steps and...if this behavior occurs, this is how the staff reacts..." [Tr. Vol. I, p. 108.]

69. BIP's need to be implemented consistently and with fidelity. Ms. Brunsell concluded for behavior plans, "staff needs to know what to expect to happen and the students need to know what to expect is going to happen, so that they can

modify that behavior and they know what's coming. It's imperative." [Tr. Vol. I, p. 108.]

70. Ms. Brunsell concluded that if a BIP is not followed consistently, "[t]he students don't know what to expect. The staff doesn't know how to react to problematic behavior, and you won't see a reduction in that behavior." [Tr. Vol. I, pp. 108-109.]

71. Petitioner is responsible for ensuring that student IEPs and BIPs are implemented and that she does not have the authority to deviate from those plans. [Tr. Vol. I, pp. 27-28; Tr. Vol. IV, pp. 143-144 and 151-152.]

72. Petitioner is required to know the contents of each student's BIP. [Tr. Vol. IV, pp. 143-144.]

73. During the January 17, 2019 investigatory interview, Petitioner was asked if she had read and knew the contents of Student A's and Student B's IEPs and BIPs. She said that she had. [Tr. Vol. II, p. 521.]

74. Student A was a student in Petitioner's class. Student A has an IEP that requires that he have a BIP. [Tr. Vol. I, pp. 58-59; Resp. Exh. C, pp. 1-15; Resp. Exh. D, pp. 1-5.]

75. Student A's BIP is entitled "Functional Behavioral Assessment and Positive Behavior Support Plan,"[25] which had an initial date of plan of February 13, 2018, including a revision date of September 20, 2018. [Resp. Exh. D, pp. 1-5.]

76. Student A's BIP contained the following pertinent information: he has a disability certification of Other Health Impairment (OHI); he has a history of behavioral difficulties both at school and at home, including lack of apathy; he has had several physical altercations with other students and school staff since starting at Linsday and his behaviors are unpredictable and exhibits extreme mood changes; his BIP contains a description of how staff should respond to specific behavior, including using Nonviolent Crisis Intervention techniques and walking him to the office by a staff member or clearing the classroom (emergency interventions); and his behaviors include inappropriate behaviors, blurting out, continued defiance, leaving the classroom without permission, refusal to work and/or take a break, and hitting/kicking or physical behaviors. [Resp. Exh. D, pp. 1-5.]

77. Petitioner acknowledged that Student A engaged in those type of behaviors in the classroom. When Student A's behaviors escalated, Student A was never

[25] Hereinafter referred to as "Student A's BIP."

walked to the principal's office nor was the classroom ever cleared, despite Student A's BIP indicating such interventions should have taken place. [Tr. Vol. I, pp. 59-60; Resp. Exh. D, pp. 1-5.]

78. Student A's BIP also contained positive programming for behavioral intervention, including Student A's desk be placed by the teacher's desk and that Student A be given jobs in the classroom. However, Petitioner did not place Student A's desk by her desk nor did she provide Student A jobs. [Tr. Vol. I, p. 59; Resp. Exh. D, pp. 1-5.]

79. Student B was also a student in Petitioner's class. Student B has an IEP that requires he have a BIP. [Tr. Vol. I, p. 60; Resp. Exh. C, pp. 16-42; Resp. Exh. D, pp. 6-9.]

80. Student B's BIP is entitled "Functional Behavioral Assessment and Positive Behavior Support Plan,"[26] which had an initial date of plan of December 5, 2017, including revision dates of January 15, 2018, February 24, 2018, and March 20, 2018. [Resp. Exh. D, pp. 6-9.]

81. Student B's BIP contained the following pertinent information: he has a disability certification of EI; his behavior impeding learning includes refusal to do work, refusal to comply to staff directions, physical assault, verbal and physical intimidation, and refusal to remain in his classroom; and his BIP contained behavioral interventions as well. [Resp. Exh. D, pp. 6-9.]

82. Student B's BIP also contained positive programming for behavioral intervention and modification to his learning environment, including the use of proactive behavior strategies to reduce the likelihood of his behaviors (such as break cards). However, Petitioner admitted that break cards were not used with Student B. [Tr. Vol. I, p. 60; Resp. Exh. D, pp. 6-9.]

83. Student B's IEP also stated that the use of Crossroads be used as a specific accommodation. However, Petitioner did not operate Crossroads properly. [Tr. Vol. I, pp. 179-180; Resp. Exh. C, pp. 33 and 37.]

84. During the 2017-2018 school year, it was discovered by Respondent's staff that many of EI students were missing documents from the BIPs and IEPs. In order to fix this issue, Mr. Phelps held a meeting with Ms. Brunsell, Jody Girou (school social worker), and both EI classroom teachers at the beginning of the school year. At this meeting, both Ms. Brunsell (special education director) and Mr. Phelps had knowledge that the BIPs and IEPs were not in place or were out of date. Also, both EI teachers (Ms. Wheatcraft and Petitioner) would be

[26] Hereinafter referred to as "Student B's BIP."

provided a substitute teacher so that they could have time to get the BIPs in order. However, this never occurred because Petitioner went on her first medical leave of absence. [Tr. Vol. I, p. 277; Tr. Vol. II, pp. 316-320.]

85. But even when Petitioner came back from her medical leave, there was no evidence presented showing that a substitute was provided to give Petitioner time to update the students' BIPs.

86. At the beginning of the 2018-2019 school year, Petitioner discovered that the students BIPs were ineffective and that they needed revisions. Petitioner further determined that Student A's BIP needed revision because it stated when he became physically aggressive and out of control, the classroom needed to be cleared, and the principal called. [Resp. Exh. D, p. 4.] However, Petitioner testified this is inappropriate because walking an agitated student down to the principal's office would take him "so much further from safety of the recovery room..." [Tr. Vol. IV, pp. 65-66.]

87. Despite the need to have the BIPs in place or revising them, neither Ms. Brunsell, Ms. Girou, nor Mr. Phelps took any action to see that the BIPs were updated, created, or implemented in Petitioner's absence during medical leave or even after she came back from her medical leave. The BIPs were not updated or implemented swiftly enough. [Tr. Vol. II, p. 321.]

88. Petitioner was also running Crossroads to the best of her ability, without any clear directive from management, despite Petitioner alleging she did not run Crossroads as listed in Student B's IEP.

89. Students' BIPs and IEPs were not updated for several months and Petitioner began the process to update them in a timely fashion.

90. Other staff members should have completed these documents in her absence; and by their failure to do so, shows that there was no set time frame established to complete these updates.

Investigatory Interview dated January 17, 2019

91. On January 17, 2019, Mr. Dietzel[27], on behalf of Respondent, conducted an interview of Petitioner, along with Ms. Grigg and two District staff members, to address the allegations against Petitioner. Petitioner also had two union representatives present with her. At the interview, Ms. Grigg directed Petitioner to "answer all questions truthfully and without evasion and fully." [Tr. Vol. II, pp. 519-520.]

[27] Mr. Dietzel is also the attorney representing Respondent in this case.

92. Respondent alleges that Petitioner stated she was aware of, and fully implemented Student A's and B's IEP and BIP; however, follow-up questions made it evident that she was not truthful. [Jt. Exh. 2, p. 15; Tr. Vol. II, pp. 520-524.] However, Petitioner was not dishonest or insubordinate during Respondent's investigation in regard to the implementation of the student IEPs and BIPs.

93. Respondent alleges that Petitioner lied about that she begged other staff members to intervene during the situation with Student B on December 12, 2018. [Jt. Exh. 2, p. 15; Tr. Vol. II, p. 525.] However, all three EA's that were present during the altercation deny hearing Petitioner beg for help. Mr. Van Tifflin asked Petitioner two or three times to let him help her, but she said to Mr. Van Tifflin, "I've got this[.]" Ms. Garchow acknowledged that Mr. Van Tifflin asked Petitioner if she needed help. [Tr. Vol. I, pp. 93-94 and 201; Tr. Vol. II, pp. 380-381; Tr. Vol. III, pp. 47-48.]

94. During cross-examination, Petitioner clarified her position as follows, "I did ask for assistance. Maybe 'begged' wasn't the proper word, but again I'm not used to dealing with lawyers." [Tr. Vol. IV, p. 107.] She then appeared to state she was asking staff to help her with Student B prior to the altercation because he was not de-escalating. [Tr. Vol. IV, pp. 107-112.]

95. Petitioner was dishonest and insubordinate during her investigative interview in regard to her being dishonest about "begging" for help from staff members.

96. Respondent alleges that Petitioner lied about her breasts being exposed during the situation with Student B on December 12, 2018. [Jt. Exh. 2, p. 15; Tr. Vol. II, pp. 524-525.]

97. Petitioner testified that during the altercation on December 12, 2018, her breasts were exposed by Student B. She reported that Student B pulled her t-shirt down that was stretched past her bellybutton exposing her breasts. She indicated that she was wearing a bra and that the bra was not pulled down. She reported this information on the day of the incident to Mr. Garcia, School Service Worker at Linsday with the District, and Ms. Connors, the school secretary. She also reported this to school administrators during the January 17, 2019, investigatory interview. [Tr. Vol. I, p. 91; Tr. Vol. II, pp. 524-525; Tr. Vol. IV, pp. 139 and 160-161.]

98. Mr. Garcia stated Petitioner did not mention anything about her breasts being exposed. [Tr. Vol. I, pp. 247-248.] Ms. Grigg stated during the investigatory interview, that Petitioner stated her breasts were exposed. However, in the

subsequent investigation, no other staff member stated Petitioner's breasts were exposed. Moreover, no other staff members indicated that Petitioner told them that her breasts were exposed. [Tr. Vol. II, pp. 524-525.] Mr. Phelps did not recall being informed by Petitioner that her breasts were exposed during the altercation. Mr. Phelps did not recall observing the neck of Petitioner's t-shirt being stretched out. [Tr. Vol. I, p. 299.]

99. A review of Petitioner's photograph immediately following the altercation shows no indication that her t-shirt was stretched to the point that her breasts would have been exposed. [Pet. Exh. 1, p. 1.]

100. Petitioner was dishonest and insubordinate during her investigative interview about her allegation that her breasts were exposed.

101. Respondent alleges that Petitioner lied about not antagonizing Student B prior to the physical altercation with Student B on December 12, 2018. [Jt. Exh. 2, p. 15; Tr. Vol. II, p. 526.]

102. Petitioner received extensive training on how to de-escalate tense student situations, including a summary of that training published on a poster that is hung on the wall immediately above where Student B sat. The poster reminds staff not to "pick up the rope," which meant that staff should not engage in a power struggle with a student. [Tr. Vol. I, p. 141; Resp. Exh. J, pp. 1-3.]

103. Petitioner's conduct of coming back to the classroom on December 12, 2018, and verbally engaging with Student B after he removed himself from the classroom area was inappropriate with Petitioner's de-escalation training. Staff agreed that she "picked up the rope" and engaged with Student B in a power struggle. [Tr. Vol. II, pp. 392-393; Tr. Vol. III, pp. 54-55 and 62.]

104. Petitioner was dishonest and insubordinate during her investigative interview about her claim that she did not antagonize Student B prior to the physical altercation.

105. Respondent alleges that Petitioner lied about how she escorted Student B to the seclusion room on December 12, 2018. [Jt. Exh. 2, p. 15; Tr. Vol. II, p. 526.]

106. Petitioner testified that she dragged Student B by the armpits. [Tr. Vol. II, p. 526.] However, no other witness confirmed that she dragged Student B by the armpits. [Tr. Vol. I, p. 201; Tr. Vol. II, p. 382; Tr. Vol. III, pp. 44-45.] Ms. Garchow and Mr. Van Tifflin credibly testified that Petitioner physically held Student B's body against the floor, pushed his head into the floor at least two or

three times, and then dragged him into the seclusion room by his wrists, while his butt and legs scraped on the floor.

107. Petitioner was dishonest and insubordinate during her investigative interview in regard to how she escorted Student B to the seclusion room.

108. Respondent alleges that Petitioner lied about not briefing with other staff members after the incident with Student B. [Jt. Exh. 2, p. 15.]

109. Petitioner testified that she was unable to debrief staff after the incident because she was placed on administrative leave prior to the debriefing. [Tr. Vol. IV, p. 92.]

110. Petitioner was not dishonest and insubordinate during her investigative interview in regard to Petitioner not debriefing other staff members.

111. Respondent alleges that Petitioner lied about her actions were appropriate and in compliance with her training on December 12, 2018. [Jt. Exh. 2, p. 15; Tr. Vol. II, p. 526.]

112. Petitioner received extensive training on crisis prevention and seclusion and restraint. [Tr. Vol. I, pp. 30-32 and 35; Tr. Vol. II, p. 506; Tr. Vol. II, pp. 45-46.]

113. Petitioner's conduct (regardless of how they got on the floor) of straddling Student B, restraining his head against the floor, pushing his head into the floor, and then physically dragging him by the wrists into the seclusion room violated crisis prevention and seclusion and restraint training. [Tr. Vol. I, pp. 89, 203-204, 262; Tr. Vol. II, pp. 393-394 and 481; Tr. Vol. III, p. 152.]

114. Petitioner was dishonest and insubordinate during her investigative interview in regard to her claim that her actions were appropriate and in compliance with her training on December 12, 2018.

CONCLUSIONS OF LAW

I. Legal Standard and Proposed Tenure Charges against Petitioner

Here, the tenure charges alleged six specific charges of misconduct against Petitioner, with each charge containing multiple factual allegations. [Jt. Exh. 2, pp. 3-16.]

The issue therefore is whether Respondent established by a preponderance of the evidence that the Board's discharge of Petitioner was not arbitrary or capricious. *Cona v Avondale School District* (11-61). If the Respondent meets its burden, the burden

shifts to Petitioner to rebut Respondent's case. *Williams v Detroit Public Schools* (02-18).[28]

Like in most teacher tenure hearings, many witnesses testified and there were numerous exhibits offered and admitted into evidence. The undersigned has reviewed the exhibits, transcripts of the hearing, and post-hearing briefs in deciding this matter. Of note, the undersigned would like to express that each counsel(s) for the parties displayed extreme professionalism throughout the proceedings in this matter.

In the end, the undersigned concludes that Respondent has established by a preponderance of the evidence that the Board's decision to terminate Petitioner's employment is not arbitrary or capricious. The undersigned addresses each charge separately below.

II. Charge #1 - Misconduct and Insubordination: Corporal Punishment, Assault, Battery, and Abuse of Students

For charge one, Respondent has the burden of showing by a preponderance of the evidence that Petitioner willfully violated some policy or directive (insubordination), and that her actions constituted misconduct via corporal punishment, assault, battery, and abuse of students.

A. Insubordination Defined

The Commission has established that "the general rule that insubordination involves willful violation of a rule, directive or policy which is known by the actor and which has been evenly enforced." *Davis v Board of Education of the Jackson Public Schools* (03-9), citing *Ostermann v Board of Education of the Stevenson Public Schools* (01-21); *Willis v Grand Rapids Public Schools* (79-51).

The Commission has further stated:

> [D]iscipline under the theory of insubordination may be proper, in spite of the fact that the challenged behavior involves the performance of a teacher's professional duties, where proofs show noncompliance with a known reasonable directive which required the teacher to take or refrain from taking a specific action and with which the teacher is capable of complying.

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[28] As the Commission stated in the *Williams* case, "[a]ppellee, the party with the burden of proof, must establish a prima facie case by a preponderance of the evidence. Then the burden of going forward with the evidence shifts to the other party, appellant, to rebut that prima facie case developed. *Goodwin v Kalamazoo* (74-6-R and 75-35-R); *Mayfield v Pontiac* (00-18)."

Flowers v Detroit Board of Education (91-20).

B. Misconduct Defined

The Michigan Supreme Court has defined misconduct as the following:

> In these cases this Court adopted the classic definition of misconduct originally drafted by the Wisconsin supreme court in *Boynton Cab Company v. Neubeck*, 237 Wis. 249, 296 N.W. 636, 640: '* * * the term 'misconduct' * * * is limited to *conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.* On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.'
>
> *Carter v Michigan Employment Security Commission*, 364 Mich 538, 541 (1961) (emphasis added).

Moreover, misconduct is defined by Black's Law Dictionary as "[a] dereliction of duty; unlawful or improper behavior." *Black's Law Dictionary* 1089 (9th ed).

C. The December 10, 2018 Incident concerning Student A

On December 10, 2018, Ms. Garchow credibly testified that she and Petitioner physically escorted Student A into the seclusion room because Student A had become physical. Ms. Garchow further credibly testified that she witnessed Petitioner placing her foot on Student A's butt and pushed him into the seclusion room while saying, "It's not CPI, but--[.]" [Tr. Vol. II, p. 373.] Petitioner denied this statement. [Tr. Vol. IV, pp. 84-85.]

As a trier of fact, the undersigned must determine the weight, the effect and the value of the evidence. The undersigned must also determine whether to believe any witness or evidence and the extent to which any witness or evidence should be believed. The undersigned may take into consideration any bias, prejudice or motive that may have influenced the witness' testimony. The weight to be given to a witness or evidence is

discretionary with the ALJ as the presiding judge. *Kern v Pontiac Township*, 93 Mich App 612; 287 NW2d 603 (1979).

Moreover, in evaluating the credibility or the weight to be given to the testimony of a witness or documentary evidence, the judge may consider the demeanor of the witness, the reasonableness of the testimony or evidence, and the interest, if any, the witness would have in the outcome of the proceedings. *People v Way*, 303 Mich 303; 6 NW2d 523 (1942), *cert den* 318 US 783 (1943). "The credibility of a witness is determined by more than words and includes tonal quality, volume, speech patterns, and demeanor, all giving clues to the factfinder regarding whether a witness is telling the truth." *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129, citing *State v Turner*, 186 Wis 2d 277; 521 NW2d 148 (Wis App, 1994). In an administrative hearing, the ALJ is in a superior position to assess the credibility of the witnesses appearing before him. See *Shann v Shann*, 293 Mich App 302, 307; 809 NW2d 435 (2011).

The undersigned was able to observe Ms. Garchow in-person and to determine the credibility of her and whether she was telling the truth. The undersigned found Ms. Garchow's testimony to be credible based on her demeanor, tonal quality, speech patterns, etc. Therefore, the undersigned found Ms. Garchow's account of Petitioner's actions of December 10, 2018, to be credible.

D. The December 12, 2018 Incident concerning Student B

On December 12, 2018, Ms. Garchow and Mr. Van Tifflin credibly testified that Petitioner physically held Student B's body against the floor, pushed his head into the floor at least two or three times, and then dragged him into the seclusion room by his wrists, while his butt and legs scraped on the floor. Ms. Garchow and Mr. Van Tifflin further credibly testified that Mr. Van Tifflin offered to assist Petitioner, but she refused. [Tr. Vol. I, pp. 200-201 and 203; Tr. Vol. II, pp. 331 and 380-385.]

Mr. McCann testified that he did not see Petitioner push and/or bang Student B's head down into the floor and that he did not hear an offer from help from the other EA's. [Tr. Vol. II, pp. 32-33.] However, the undersigned accorded Mr. McCann's testimony/conclusions of the incident lesser evidentiary weight. There were no other witnesses to corroborate Mr. McCann's testimony. Instead, the two EA's with the closest views of the incident, Mr. Van Tifflin and Ms. Garchow, consistently provided similar testimony as to the events that occurred on December 12, 2018. Both Mr. Van Tifflin and Ms. Garchow corroborated each other statements and therefore, the undersigned found Ms. Garchow's and Mr. Van Tifflin's account of Petitioner's actions of December 12, 2018, to be more credible than Mr. McCann's.

Of note, there were questions raised about Ms. Garchow's credibility based on text messages she exchanged with Mr. Phelps, the principal of Linsday, immediately

following the December 12, 2018 incident. In one such exchange, Ms. Garchow wrote, "*While pulling him out of the desk by herself* when Thad [Mr. Van Tifflin] offered to help, she ended up on top of him, hand on head, and slammed his head down le (sic) 3 times. Then grabbed him by his wrists and dragged him down the hallway into the room[.]" [Resp. Exh. I, p. 2 (emphasis added).] The undersigned emphasizes the words "While pulling him out of the desk by herself" because Ms. Garchow testified that she never saw Petitioner pull Student B out of the desk. When questioned by the undersigned and Petitioner's counsel to this discrepancy, Ms. Garchow stated it was just poor wording. [Tr. Vol. II, pp. 397-398 and 408.] During re-direct, Ms. Garchow also stated she was extremely upset when she sent those text messages to Mr. Phelps and that later that day when she met with human resources and told her version of what occurred, she told them that she did *not* see how Petitioner and Student B ended up on the floor. [Tr. Vol. II, pp. 418-419.] The undersigned finds that Ms. Garchow provided a reasonable explanation for the misstatements in the text messages because they were sent immediately following the incident. Nonetheless, Ms. Garchow's account of the incident was corroborated by Mr. Van Tifflin, which only further bolster's Ms. Garchow's credibility.

E. Corporal Punishment

MCL 380.1312(1) defines corporal punishment as "the deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means of discipline."

The evidence establishes that Petitioner's actions on December 12, 2018, by holding Student B's body against the floor, pushing his head into the floor, and physically dragging him into the seclusion room, constitutes corporal punishment.

F. Assault

Assault is defined as "any intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create a well founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented." *Tinkler v. Richter*, 295 Mich. 396, 401 (1940). Assault is a crime under the Michigan Penal Code, MCL 750.81.

The evidence establishes that Petitioner's actions on December 12, 2018, when she stated she would "fucking drag you [Student B] in here then[,]" Petitioner made an intentional offer of corporal injury toward the student with the imminent ability to effectuate injury, which constitutes assault. [Tr. Vol. II, p. 382.]

G. Battery

Battery is defined as "the willful touching of the person of another by the aggressor or by some substance put in motion by him; or, as it is sometimes expressed, a battery is the consummation of the assault." *Id.* Battery is a crime under the Michigan Penal Code, MCL 750.81.

The evidence establishes that Petitioner's actions on December 10, 2018, by placing her foot on Student A's butt and pushing him into the seclusion room, she willfully touched Student A without consent, thus constituting battery.

The evidence further establishes that Petitioner's actions on December 12, 2018, consisted battery when she willfully touched Student B against his will.

H. Abuse of Students

MCL 722.622(g) defines child abuse as "harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or a member of the clergy."

The evidence establishes that Petitioner's actions on December 10 and 12, 2018, constituted child abuse when she harmed Students A and B throughout nonaccidental physical injury.

I. Petitioner Engaged in Misconduct and Insubordination via Corporal Punishment, Assault, Battery, and Abuse of Students

Respondent has proven, by a preponderance of the evidence, that Petitioner willfully violated some policy or directive (insubordination), and that her actions constituted misconduct via corporal punishment, assault, battery, and abuse of students.

As noted above, Petitioner's physical aggressive actions toward Students A and B were clearly inappropriate and met the meanings of corporal punishment, assault, battery, and abuse of students.

The overwhelming record evidences that Petitioner knew of the District's policies and the Michigan Professional Educator's Code of Ethics (Code of Ethics).[29] Petitioner had knowledge of the District's corporal punishment policy and nevertheless violated this policy based on her conduct toward Students A and B. She furthermore had knowledge

[29] Described in greater detail in section IV of the *Conclusion of Law* section.

of the seclusion and restraint policy/laws, yet again, violated these directives based on her conduct toward Students A and B.

The undersigned finds that Petitioner engaged in willful violation of Respondent's policies and Code of Ethics via the corporal punishment, assault, battery, and abuse of students based on her physical aggressive actions toward Students A and B in December of 2018.

The undersigned further finds that Petitioner engaged in misconduct via the corporal punishment, assault, battery, and abuse of students based on her physical aggressive actions toward Students A and B in December of 2018.

Accordingly, Petitioner engaged in misconduct and insubordination via corporal punishment, assault, battery, and abuse of students.

III. Charge #2 - Misconduct and Insubordination: Disregard for Seclusion and Restraint Laws, Policy, and Training

For charge two, Respondent has the burden of showing by a preponderance of the evidence that Petitioner willfully violated some policy or directive (insubordination), and that her actions constituted misconduct by disregarding seclusion and restraint laws, policy, and training.

A. Petitioner's Knowledge of Seclusion and Restraint Laws, Policy, and Training

Under the Michigan Revised School Code (Code), seclusion and restraint can be used "only as a last resort in an emergency situation and are subject to diligent assessment, monitoring, documentation, and reporting by trained personnel." MCL 380.1307(1)(c). One of the requirements with the Code, was that all districts adopt a board policy prohibiting the use of seclusion and restraint except in emergency situations. MCL 380.1307a. Effective August 23, 2017, the Board adopted Policy 5630.01, Student Seclusion and Restraint, in response to the Code's requirements. [Resp. Exh. R, pp. 1-20.]

The Code also requires that districts train all staff on the appropriate use of emergency seclusion and restraint. MCL 380.1307g. The evidence establishes that Petitioner received her training in-person on Michigan's seclusion and restraint law at the Professional Learning Conference held on August 30, 2017. [Resp. Exh. L, pp. 1-55; Resp. Exh. M, pp. 1-25; Resp. Exh. N, p. 12; Tr. Vol. I, pp. 35-37.] Respondent also required that all staff watch a video training prepared by Mr. Dietzel. [Resp. Exh. M, pp. 1-25; Tr. Vol. II, p. 506; Tr. Vol. III, pp. 45-46.] This video was shown to all staff at

Linsday, where Petitioner taught, at the beginning of the 2017-2018 school year. [Tr. Vol. I, p. 134; Tr. Vol. III, pp. 45-46.]

Moreover, Respondent provided Petitioner with training in the areas of CPI (e.g., de-escalation strategies and physical safe holds), seclusion and restraint training/law, and Crossroads behavior intervention program. She also became a trainer in a crisis prevention course called LSCI, which was at the expense of Respondent. [Tr. Vol. I, pp. 30-35; Tr. Vol. IV, p. 134.]

i. Failure to Use De-Escalation

The Code and Board Policy 5630.01 prohibit the use of seclusion or restraint as a substitute to positive behavioral intervention and support. MCL 380.1307h(d); MCL 380.1307e. De-escalation is emphasized in CPI and LSCI trainings. De-escalation was included in the seclusion and restraint trainings. [Tr. Vol. I, pp. 30, 34, 191;. Tr. Vol. II, pp. 359-360 and 446; Tr. Vol. III, p. 91; Resp. Exh. L, pp. 1-55; Resp. Exh. M, pp. 1-25.]

"De-escalation techniques" is defined as "evidence- and research-based strategically employed verbal or nonverbal interventions used to reduce the intensity of threatening behavior before, during, and after a crisis situation occurs." MCL 380.1307h(b). A summary on how to de-escalate tense student situations, including a summary of that training is published on a poster that is hung on the wall immediately above where Student B sat. The poster reminds staff not to "pick up the rope," which means staff should not engage in a power struggle with a student. [Tr. Vol. I, p. 141; Resp. Exh. J, pp. 1-3.]

Despite the Code, board policy, training, and visual reminders, Petitioner consistently failed to use proper de-escalation procedures. Examples include when Petitioner pushed Student A by the butt into the seclusion room, when she said in front of Student B "I don't like him either," when she required Student B to go into the seclusion room when he was no longer escalated, and when she re-engaged with Student B on December 12, 2018, resulting in the physical altercation. All of these examples violate the Code, board policy, and is against the training that Petitioner received.

ii. Seclusion as a Last Resort

The Code requires that seclusion only be used as a last resort for emergency intervention and only when the student's behavior poses an imminent risk to the student's safety or the safety of someone else. MCL 380.1307b(d); MCL 380.1307c(a); MCL 380.1307h(e). The Code further states that staff cannot use seclusion as a form of discipline or punishment. MCL 380.1307h(e). Again, this training material was provided at the conference. [Resp. Exh. L, pp. 1-55; Resp. Exh. M, pp. 1-25.]

The evidence establishes that Petitioner directed Student B into the seclusion room after eloping from the room, even though Student B was already de-escalated and not a safety issue to himself or others. By Petitioner directing Student B into the seclusion room, this only re-escalated Student B's behavior. [Tr. Vol. I, pp. 194-196; Tr. Vol. II, pp. 367-368 and 370-371.] This example is contrary to using seclusion as a last resort by Petitioner and only further shows how Petitioner violated the Code, board policy, and training received.

iii. Seclusion longer than 15 minutes

The Code states that the time limit for seclusion and restraint for an elementary-age student in a seclusion room is 15 minutes. MCL 380.1307c(f). If the seclusion lasts longer than 15 minutes, the Code states that staff must (i) document the reason why the seclusion went beyond the time limit and (ii) must provide "[a]dditional support, which may include a change of staff, or introducing a nurse, specialist, or additional key identified personnel." MCL 380.1307c(f)(i)-(ii). This training material was provided at the conference, including a poster hung above Student B's desk in the seclusion area reminding staff about these requirements. [Resp. Exh. J, pp. 1-3; Resp. Exh. L, pp. 1-55; Resp. Exh. M, pp. 1-25.]

The evidence establishes that Students A and B were both sent to the seclusion at Petitioner's direction on December 10, 2018, and both stayed in seclusion for more than 15 minutes. The evidence further establishes that Student A was secluded for over 120 minutes and Student B was secluded for over 90 minutes. The evidence establishes that Petitioner did not provide any additional resources to end the seclusions for both students. [Resp. Exh. A, pp. 1-6; Resp. Exh. B, pp. 11-14.]

In regard to Student A's seclusion, he was approximately a 7 or 8 year old EI student. The observation log noted the following during the seclusion: he refused to comply and was violent; ninja kicking door from across the room; the door was opened at times throughout the seclusion process to try to de-escalate him, but no avail; he was screaming, crying, rocking, and hitting his head on the wall; he told staff that he had to use the restroom, but he did not go to the bathroom; and when the seclusion ended, staff had to bring paper towels to clean up hi salvia. [Resp. Exh. A, pp. 1-6; Tr. Vol. I, p. 92; Resp. Exh. C, pp. 1-15.]

Petitioner's defense for Student A's seclusion is largely based on the following: (i) Mr. Phelps reviewed the documentation form and had no issues with it; and (ii) because Mr. Phelps came into the time out area for some undefined period of time, his presence is a sufficient additional measure to bring the 2-hour seclusion into compliance with the 15-minute rule. [See Tr. Vol. II, p. 340.]

The undersigned is unpersuaded by this argument. Petitioner admitted the documentation form is improper. The fact that Mr. Phelps stopped by for a few minutes or that he does not have a problem with what occurred does not make what happened legally appropriate. Mr. Phelps was wrong.

In regard to Student B's seclusion, he was an 8 year old EI student. The observation log noted the following behaviors of Student B during the incident: he said "shut the fuck up nigger," "I'll kill you Mark," and "I'll kill you with my glock nigger"; he was kicking the door and punching the glass; and other foul language and hitting the door. [Tr. Vol. I, p. 99; Resp. Exh. B, p. 13; Resp. Exh. C, p. 16.]

Both of these seclusions were under Petitioner's watch, including supervising the EA's. The evidence record shows that Petitioner did not ensure the EA's under her supervision were following the seclusion laws nor did she ensure the students in her care were safe in the seclusion rooms.

Moreover, she did not ensure that either student received additional supports after 15 minutes of seclusion, as required pursuant to MCL 380.1307c(f)(i)-(ii). She did review and initial the observation log forms describing each incident. However, she did not properly debrief with staff nor properly report the concerns to administration. And in fact, Petitioner acknowledged that the seclusions were not consistent with her understanding of the seclusion requirements or with the training she received.

The Code and board policy clearly prohibit what occurred to Students A and B on December 10, 2018. The evidence is abundantly clear that Petitioner was in charge of the classroom and the EA's, she received training on seclusion, and she sent Students A and B to the seclusion room. Nonetheless, Petitioner did nothing to ensure the seclusion rules were followed in her classroom that day and her actions clearly violated the Code (which she did not dispute). In the end, Students A and B are emotionally impaired students and it was unacceptable for both to be in the seclusion rooms for such a long period of time.

iv. Seclusion of Student A on December 10, 2018

The Code and board policy states that students be treated with care and dignity at all times, including during an emergency seclusion and restraint. MCL 380.1307(1)(a); MCL 380.1307h(e). This training material was provided at the conference. [Resp. Exh. L, pp. 1-55; Resp. Exh. M, pp. 1-25.]

As previously stated, Ms. Garchow credibly testified that on December 10, 2018, she and Petitioner physically escorted Student A into the seclusion room because Student A had become physical. Ms. Garchow further credibly testified that she witnessed Petitioner placing her foot on Student A's butt and pushed him into the seclusion room

while saying, "It's not CPI, but--[.]" [Tr. Vol. II, p. 373.] Following this statement, the evidence establishes that Student A stayed in the room for the next two hours with no intervention by Petitioner. [Resp. Exh. A, pp. 1-6.]

CPI training informs staff how to escort a student into a seclusion room. [Tr. Vol. I, p. 190.] However, Petitioner clearly acted contrary to this training as to her conduct on December 10, 2018. In fact, Ms. Garchow, who also had CPI training, confirmed that Petitioner's actions with Student A were contrary to that training. [Tr. Vol. II, pp. 373-375.]

The evidence establishes that Petitioner's treatment of Student A on December 10, 2018, violated the Code and board policy to treat students with care and dignity at all times, even during times of emergency seclusion and restraint. See MCL 380.1307(1)(a); MCL 380.1307h(e).

v. Seclusion/Restraint of Student B on December 12, 2018

The Code and board policy prohibit any restraint that negatively impacts breathing[30], prone restraint, and physical restraint, other than emergency physical restraint. MCL 380.1307b(h),(i), and (j). Staff are trained through CPI that they cannot be on top of a student. Here, the evidence establishes that Petitioner straddled Student B's body with her own to hold him down during the incident on December 12, 2018, in violation of MCL 380.1307b(h),(i), and (j) and MCL 380.1307h(q).

The Code and board policy prohibit restraints except for those that are expressly taught through training. MCL 380.1307g. The evidence establishes that holding Student's B head against the floor and physically pushing it into the ground is against CPI training, in violation of MCL 380.1307g.

Moreover, staff are taught in CPI training how to properly transport a student from one location to another. This training requires the use of two staff members to be involved. [Tr. Vol. I, p. 259.] The evidence establishes that Petitioner's action of dragging Student B by the wrists with his butt and legs on the floor is not the appropriate way to transport a student and not consistent with CPI training, in violation of MCL 380.1307g.

Ms. Krevinghaus, Behavior Intervention Specialist with Bay Arenac ISD, also stated that although it is not expressly written in the CPI manual, she does inform staff member's that you should rely on your colleagues when they need support or a break. [Tr. Vol. II,

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[30] "'Restraint that negatively impacts breathing' means any restraint that inhibits breathing, including floor restraints, facedown position, or any position in which an individual is bent over in such a way that it is difficult to breathe. This includes a seated or kneeling position in which an individual being restrained is bent over at the waist and restraint that involves sitting or lying across an individual's back or stomach." MCL 380.1307h(q).

pp. 473-476.] As such, Respondent argues that Petitioner did not follow training when she rejected Mr. Van Tifflin's offer to help her with Student B.

As previously stated, the Code and board policy states that students be treated with care and dignity at all times, including during an emergency seclusion and restraint. MCL 380.1307(1)(a); MCL 380.1307h(e). The evidence establishes that when Petitioner the comment to Student B of "I'll fucking drag you in here then[,]" and then proceeded to drag him by his writs into the seclusion room, she did not treat Student B with care and dignity, in violation of MCL 380.1307(1)(a); MCL 380.1307h(e).

B. Petitioner Engaged in Misconduct and Insubordination by Disregarding Seclusion and Restraint Laws, Policy, and Training

Respondent has proven, by a preponderance of the evidence, that Petitioner willfully violated some policy or directive (insubordination), and that her actions constituted misconduct by disregarding seclusion and restraint laws, policy, and training.

The record is clear that Petitioner received the legal and technical requirements for seclusion and restraint techniques, despite her claim that she did not. The examples above show how Petitioner consistently violated the Code, board policy, and training she received pertaining to seclusion and restraint requirements. Petitioner had knowledge of these rules and regulations and even acknowledged that her seclusions were not consistent with her understanding of the seclusion requirements or with the training she received.

The undersigned finds that Petitioner engaged in willful violation of Respondent's rules and regulations (insubordination) by disregarding seclusion and restraint laws, policy, and training based on her actions toward Students A and B in December of 2018.

The undersigned further finds that Petitioner engaged in misconduct by disregarding seclusion and restraint laws, policy, and training based on her actions toward Students A and B in December of 2018.

Accordingly, Petitioner engaged in misconduct and insubordination by disregarding seclusion and restraint laws, policy, and training.

IV. Charge #3 - Misconduct: Unprofessional and Harmful Conduct Toward Students

For charge three, Respondent has the burden of showing by a preponderance of the evidence that Petitioner engaged in misconduct by her unprofessional and harmful conduct toward students.

A. Petitioner's Previous and Other Incidents of Misconduct

The evidence establishes that Petitioner's conduct of Student A on December 10, 2018; Student B on December 12, 2018; the seclusions of Students A and B on December 10, 2018; and the seclusion and restraint techniques used on Students A and B,[31] also constitute unprofessional and harmful conduct toward the students and violate the following provisions of Board Policy and Educator's Code of Ethics:

- Board Policy J 7610, Corporal Punishment, which defines corporal punishment "as the intentional use of physical force upon a student for any alleged offense or behavior, or the use of physical force in an attempt to modify the behavior, thoughts, or attitudes of a student. [Resp. Exh. Q, p. 1.]

- Board Policy G4055, Staff Conduct, which states, "[t]he Board expects employees to enforce a standard of personal conduct in the school buildings and on school grounds which shall be above reproach and which shall contribute to a high morale in the school and a wholesome school reputation." [Resp. Exh. Q, p. 7.]

- Board Policy G4080, Staff-Student Relations, which states, "[s]taff members shall be expected to regard each student as an individual and to accord each the rights and respect due any individual. Students shall be treated with courtesy and consideration." [Resp. Exh. Q, p. 6.]

- Board Policy 5630.01, Student Seclusion and Restraint, which requires staff to care and show dignity to students when restraining and/or secluding students, and to never use seclusion as a form of discipline or punishment. [Resp. Exh. R, pp. 1-2.]

- The Code of Ethics[32] which requires all professional educator's to "respect the inherent dignity and worth of each individual" and to "uphold personal and professional integrity and behave in a trustworthy manner. They adhere to acceptable social practices, current state law, state and national student assessment guidelines, and exercise sound professional judgement." [Resp. Exh. P, p. 1.]

In addition to the conduct described in subsections II and III of the *Conclusions of Law* sections, there were other incidents in which Petitioner's misconduct violated the above policies.

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[31] As described in detail in subsections II and III of the *Conclusions of Law* sections.
[32] Approved by the State Board of Education on December 3, 2003. [Resp. Exh. P, p. 1.]

First, Mr. Van Tifflin and Ms. Garchow credibly testified that Petitioner treated Student B worse than his other classmates. An example includes when Petitioner directed Student B into the seclusion room after eloping from the room, even though Student B was already de-escalated and not a safety issue to himself or others. By Petitioner directing Student B into the seclusion room, this only re-escalated Student B's behavior. [Tr. Vol. I, pp. 194-196; Tr. Vol. II, pp. 367-368 and 370-371.] This example establishes that Petitioner used "physical force in an attempt to modify the behavior, thoughts, and attitudes of a student [Student B][,]" in violation of Board Policy J 7610, Corporal Punishment.

Second, Ms. Garchow credibly testified that she informed Petitioner that Student B said that he did not like Petitioner, to which Petitioner responded, "That's okay. I don't like him either." Petitioner's statement was said around the rest of the students in the classroom, but it was unclear if Student B heard it. [Tr. Vol. II, pp. 365-366.] This example establishes that Petitioner did not treat Student B with "courtesy and consideration," nor did she "respect the inherent dignity and worth of each individual [Student B]," nor did she "contribute to a high morale in the school and a wholesome school reputation," in violation of Board Policy G4080, Staff-Student Relations, the Code of Ethics, and Board Policy G4055, Staff Conduct.

Third, Ms. Garchow credibly testified that she asked Petitioner whether Student B had left the school building after eloping, to which Petitioner responded, "I hope he did so we can call the police and the po po can deal with him." Petitioner's statement was said around the rest of the students in the classroom. [Tr. Vol. II, p. 366.] This example again establishes that Petitioner violated Board Policy G4080, Staff-Student Relations, the Code of Ethics, and Board Policy G4055, Staff Conduct.

Fourth, Mr. Van Tifflin credibly testified that he heard Petitioner state to a student that if he continues to keep on acting like this, he would go to jail. [Tr. Vol. I, pp. 193-194.] This example again establishes that Petitioner violated Board Policy G4080, Staff-Student Relations, the Code of Ethics, and Board Policy G4055, Staff Conduct.

B. Petitioner Engaged in Misconduct and Insubordination by her Unprofessional and Harmful Conduct Toward Students

Respondent has proven, by a preponderance of the evidence, that Petitioner engaged in misconduct by her unprofessional and harmful conduct toward students.

The above examples, including Petitioner's actions on December 10 and 12, 2018, show a consistent pattern of a behavior that violates the board policy and Code of Ethics. Petitioner used insults and sarcasm with students, especially Student B, an emotionally impaired child, that was clearly uncalled for. Petitioner further physically

and verbally abused Students A and B and did not use proper seclusion and restraint requirements on December 10 and 12, 2018.

Accordingly, the evidence is unambiguous that Petitioner engaged in misconduct by her unprofessional and harmful conduct toward Students A and B, in violation of Code, Board Policy, and Code of Ethics.

V. Charge #4 - Unprofessional Conduct and Insubordination: Intentional Disregard for Professional Development Opportunities

For charge four, Respondent has the burden of showing by a preponderance of the evidence that Petitioner engaged in unprofessional conduct and insubordination by intentionally disregarding her professional development opportunities.

A. Ineffective and Incommunicative Leadership concerning Crossroads

Crossroads is a behavior modification and management system, which is utilized with the EI rooms at Linsday. [Resp. Exh. G, pp. 1-3.]

Petitioner was provided copies and read the Crossroads Manual. On August 19, 2015, Petitioner attended a six-hour training on Crossroads, which was paid for by Respondent. [Resp. Exh. W, p. 1; Resp. Exh. X, pp. 1-3; Tr. Vol. I, p. 50; Tr. Vol. IV, pp. 46 and 131-137.]

In 2016, Mr. Gosson, the former special education director/supervisor, made it clear to Petitioner that he expected Petitioner to implement Crossroads in its entirety. On October 10, 2016, Principal Ball, Petitioner's supervisor at the time, also made Petitioner aware in writing that she is expected to implement Crossroads. [Tr. Vol. IV, pp. 127 and 129; Resp. Exh. V, p. 1.]

However, over the last couple of years, there has been changes in management at the District. During the past 13 years, Linsday has had roughly seven principals and five special education directors. [Tr. Vol. IV, p. 33.] As Jessica Provoast stated, "[t]he last few years there have been very confusing with very little training, and the frequent changing of principals and special ed directors have not helped the situation." [Tr. Vol. IV, p. 34.] Due to the ineffective and incommunicative leadership, directives regarding instructions and training was blurry and unclear for Petitioner in regards to Crossroads.

Petitioner and Ms. Provoast both used Crossroads in their respective classrooms for a number of years and both implemented the program in a similar manner. [Tr. Vol. IV, p. 12.] Ms. Provoast credibly testified that they were never instructed that they could not adapt or change the program. [Tr. Vol. IV, p. 13.] Over the last few years, Ms. Provoast credibly testified that they did receive feedback from the special education

director about the implementation of the program, but never anything specific. [Tr. Vol. IV, p. 14.]

One of the new leaderships at the District was Ms. Brunsell. Ms. Brunsell is the Special Education Supervisor for the Bay Arenac ISD, but she is assigned to the District as the Special Education Director. She replaced Mr. Gosson for the 2018-2019 school year. [Tr. Vol. I, pp. 105, 110-112, 116, and 177.]

In August 2018, Ms. Brunsell decided that Crossroads was going to be used in both EI classrooms and had concerns about Petitioner's classroom. However, she did not arrange for training on the program until November 2018. [Tr. Vol. I, pp. 167-168.]

For roughly two and a half months, there was no training provided to staff about Crossroads, despite Ms. Brunsell's concern. Even then, Ms. Brunsell only provided training to Ms. Wheatcraft and the EAs, and just hoped those individuals would model the program for Petitioner until she herself wanted to implement Crossroads. [Tr. Vol. I, p. 158.] There was no evidence showing that Ms. Brunsell directed Petitioner to change the way she implemented Crossroads. As Ms. Brunsell stated, Petitioner seemed "cold" to the idea of additional Crossroads training and she did not want to push Petitioner too hard. [Tr. Vol. I, p. 117.]

Moreover, in November 2018, Ms. Krevinghaus, the Crossroads trainer, came to Linsday to train Ms. Wheatcraft's room. However, Ms. Krevinghaus testified she did not train Petitioner's classroom because she did not feel "invited into" her classroom. [Tr. Vol. II, p. 456.] Additionally, Mr. Phelps, who is Petitioner's direct supervisor, testified that he had concerns about how Crossroads was being run, but that he never addressed those concerns with Petitioner. [Tr. Vol. II, pp. 323-324.]

Ms. Brunsell testified that she attempted to talk to Petitioner about her concerns, but Petitioner ignored her. [Tr. Vol. I, p. 121.] Ms. Brunsell, though, had many other opportunities to express her concerns to Petitioner via e-mail or phone, but chose not to. [Tr. Vol. I, pp. 171-172.] Pursuant to Ms. Brunsell's title, she is the director of the department and therefore, it would be her responsibility to express any concerns to Petitioner about Crossroads.

In regard to the program itself, Mr. McCann testified that Petitioner was implementing the program "fairly close to what the Crossroads Program is." [Tr. Vol. III, p. 22.] For example, Petitioner was using stamps sheets to keep track of student levels, and those stamps went home with students every day. But sometimes, it was difficult to keep track of the levels because students would forget to bring them back. [Tr. Vol. III, p. 52.] Mr. McCann testified that under the Bay Arenac ISD's version of Crossroads, stamps can still be taken away for bad behavior, as Petitioner did, but now there is a focus on them earning them back. [Tr. Vol. III, p. 52.]

Petitioner acknowledged that her application of the program was not perfect. For example, she ran the school store for Crossroads biweekly, rather than on a weekly basis. She testified for this deviation was that she preferred to give students the "opportunity to earn enough money that they actually got to make a choice about what they were earning or what their reward was..." [Tr. Vol. IV, p. 54.]

In response, Respondent argued that Petitioner did not stay for a whole meeting in November 2018 about Crossroads. [Tr. Vol. I, pp. 117-119; Tr. Vol. II, pp. 455-458.] Moreover, Petitioner provided examples of how Petitioner did not implement Crossroads properly, which included the following:

- She did not use stamps as a positive reward system, but only took stamps away for bad behavior. [Tr. Vol. I, pp. 54 and 210; Tr. Vol. II, pp. 360-363.]

- She indicated that she has been in the room long enough that she knew how to run it and did not need to follow anybody else. [Tr. Vol. II, p. 364.]

- She did not have meaningful conversation with students after each specific set amount of time or activities. [Tr. Vol. I, pp. 55-56.]

- She did not offer opportunities for student to earn "bonus stamps," resulting in the students' inability to move to the higher levels. [Tr. Vol. I, pp. 57-58 and 210; Tr. Vol. II, pp. 360-363.]

- She did not consistently operate the school store. [Tr. Vol. I, pp. 57 and 210; Tr. Vol. II, pp. 360-363.]

And finally, Respondent argued that current staff members, with personal knowledge, concluded that Petitioner did not operate Crossroads properly with the intent or purpose of the program. [Tr. Vol. I, pp. 110-115, 124, 155-156, and 210; Vol. II, pp. 360-363.]

B. Respondent Did Not Engage in Insubordination by Intentionally Disregarding her Professional Development

It is not disputed that Petitioner received both written directives and training for Crossroads in the past. However, over the last couple of years, there have been changes in management at the District, resulting in confusion as to how Crossroads should be implemented under new management. Petitioner's brief best summarizes it, "[d]ue to the ineffective and incommunicative leadership, directive regarding instructions and training were blurry and unclear, leaving Petitioner uncertain regarding what was actually expected and required of her." [Pet's Br. p. 44.]

Respondent charges that Petitioner intentionally disregarded professional development opportunities, specifically as they pertained to Crossroads, amounting to insubordination.

To demonstrate that Petitioner was insubordinate, the Commission has established that "the general rule that insubordination involves willful violation of a rule, directive or policy which is known by the actor and which has been evenly enforced." *Davis* (03-9). The term "insubordination" has clearly elements that must be proven by Respondent, including "willful violation" and that the rule or regulation was "evenly enforced."

The evidence shows that there was no clear or reasonable directive from Respondent to Petitioner with regard to the implementation of Crossroads or training opportunities. Bay Arenac ISD provided training to Ms. Wheatcraft's room, but not Petitioner. Neither Ms. Brunsell nor Ms. Krevinghaus followed up with Petitioner regarding Crossroads training or implementation. Petitioner acknowledges that she deviated from Crossroads in some instances and Respondent even provided examples of her not fully implementing the program. However, these examples do not amount to a "willful violation" of Crossroads. The evidence is clear that management, Mr. Phelps and Ms. Brunsell (including the trainer of Crossroads, Ms. Krevinghaus), failed to provide Petitioner any specific directives, rules, or policies to her as to how they wanted Crossroads implemented. Thus, how can Petitioner be insubordinate for not following Crossroads, when management did not issue a clear and reasonable directive to her.

In conclusion, Respondent failed to issue a clear and reasonable directive to Petitioner and therefore, Respondent has failed to demonstrate by a preponderance of evidence that Petitioner's action with regard to Crossroads were insubordinate.

C. Respondent Did Not Engage in Unprofessional Conduct by Intentionally Disregarding her Professional Development

Respondent also charges that Petitioner intentionally disregarded professional development opportunities, specifically as they pertained to Crossroads, amounting to unprofessional conduct.

Misconduct is defined by Black's Law Dictionary as "[a] dereliction of duty; unlawful or improper behavior." *Black's Law Dictionary* 1089 (9th ed). For the same reasons as stated above, the undersigned also finds that Respondent failed to meet its burden of showing that Petitioner's actions met the level of misconduct with regard to this charge.

To reiterate, Petitioner believed she was using Crossroads in a manner beneficial to students. Management, including Ms. Brunsell or Mr. Phelps, never dispelled their belief or directed Petitioner to use the program differently. Therefore, how can there be a dereliction of duty by Petitioner or her displaying unlawful behavior as it came to the

implementation of Crossroads, when management failed to inform her the way it would like her to implement the program.

Respondent has failed to demonstrate, by a preponderance of evidence, that Petitioner's action with regard to Crossroads amounted to unprofessional conduct.

VI. Charge #5 - Misconduct, Insubordination, and Dishonesty: Failure to Implement IEPs and BIPs

For charge five, Respondent has the burden of showing by a preponderance of the evidence that Petitioner engaged in misconduct, insubordination, and dishonesty by her failure to implement IEPs and BIPs.

A. Implementation of IEPs and BIPs

Schools are legally required to implement students' IEPs as written. 34 CFR 300.17; Michigan Administrative Rules for Special Education (MARSE) R 340.1722. When IEPs reference a behavior intervention plan, schools are also required to implement the BIPs as written. *Letters to McWilliams*, 66 IDELR 111 (OSEP 2015).

BIP's need to be implemented consistently and with fidelity. As Ms. Brunsell testified for behavior plans, "staff needs to know what to expect to happen and the students need to know what to expect is going to happen, so that they can modify that behavior and they know what's coming. It's imperative." [Tr. Vol. I, p. 108.]

Petitioner is responsible for ensuring that student IEPs and BIPs are implemented and that she does not have the authority to deviate from those plans. Petitioner is required to know the contents of each student's BIP. [Tr. Vol. I, pp. 27-28; Tr. Vol. IV, pp. 143-144 and 151-152.]

During the January 17, 2019 investigatory interview, Petitioner was asked if she had read and knew the contents of Student A's and Student B's IEPs and BIPs. She said that she had. [Tr. Vol. II, p. 521.]

Student A was a student in Petitioner's class. Student A has an IEP that requires that he have a BIP. Student A's BIP had an initial date of plan of February 13, 2018, with a revision date of September 20, 2018. [Tr. Vol. I, pp. 58-59; Resp. Exh. C, pp. 1-15; Resp. Exh. D, pp. 1-5.]

Petitioner acknowledged that Student A engaged in the types of behavior identified in the BIP. When Student A's behaviors escalated, Student A was never walked to the principal's office nor was the classroom ever cleared, despite Student A's BIP indicating

such interventions should have taken place. [Tr. Vol. I, pp. 59-60; Resp. Exh. D, pp. 1-5.]

Student A's BIP also contained positive programming for behavioral intervention, including Student A's desk be placed by the teacher's desk and that Student A be given jobs in the classroom. However, Petitioner did not place Student A's desk by her desk nor did she provide Student A jobs. [Tr. Vol. I, p. 59; Resp. Exh. D, pp. 1-5.]

Student B was also a student in Petitioner's class. Student B has an IEP that requires a BIP. Student B's BIP had an initial date of plan of December 5, 2017, including revision dates of January 15, 2018, February 24, 2018, and March 20, 2018. [Tr. Vol. I, p. 60; Resp. Exh. C, pp. 16-42; Resp. Exh. D, pp. 6-9.]

Student B's BIP also contained positive programming for behavioral intervention and modification to his learning environment, including the use of proactive behavior strategies to reduce the likelihood of his behaviors (such as break cards). However, Petitioner admitted that break cards were not used with Student B. [Tr. Vol. I, p. 60; Resp. Exh. D, pp. 6-9.]

Student B's IEP also stated that the use of Crossroads be used as a specific accommodation. However, Petitioner did not operate Crossroads properly, which therefore, Respondent argued it violated Student's B IEP. [Tr. Vol. I, pp. 179-180; Resp. Exh. C, pp. 33 and 37.]

Based on the above information, Respondent argues that Petitioner willfully violated a directive from Respondent to implement and update student BIPs and IEPs, that she willfully violated a directive to be truthful during the investigation, and that her conduct was improper or constituted a dereliction of duty.

Respondent acknowledges that she is responsible for reviewing and implementing IEPs and BIPs for students in her classroom. However, it was discovered during the 2017-2018 school year that many of those students were missing such documents. [Tr. Vol. II, p. 316.] In order to fix this issue, Mr. Phelps held a meeting with Ms. Brunsell, Ms. Girou (school social worker), and both EI classroom teachers at the beginning of the 2018-2019 school year. [Tr. Vol. II, pp. 316-320.] At this meeting, both Ms. Brunsell (special education director) and Mr. Phelps (principal) had knowledge that the BIPs and IEPs were not in place or were out of date. It was also determined during the meeting that the EI teacher (Ms. Wheatcraft and Petitioner) would get a substitute teacher so that they can have time to get the BIPS in order. [Tr. Vol. II, pp. 316-317.] However, that never occurred because Petitioner went on her first medical leave of absence. [Tr. Vol. I, p. 277.] But even when Petitioner came back from her medical leave, there was no evidence presented showing that a substitute was provided to give Petitioner time to work on the BIPs.

At the beginning of the 2018-2019 school year, Petitioner testified that she found the BIPs to be very ineffective and that they needed revisions. [Tr. Vol. IV, p. 65.] Petitioner testified that Student A's BIP needed revision because it stated when he became physically aggressive and out of control, the classroom needed to be cleared, and the principal called. [Resp. Exh. D, p. 4.] However, Petitioner testified this is inappropriate because walking an agitated student down to the principal's office would take him "so much further from safety of the recovery room..." [Tr. Vol. IV, p. 66.]

Despite the need to have the BIPs in place or revising them, neither Ms. Brunsell, Ms. Girou, nor Mr. Phelps took any action to see that the BIPs were updated, created, or implemented in Petitioner's absence during medical leave. Moreover, upon Petitioner's return to the classroom, the BIPs were not updated or implemented swiftly enough. [Tr. Vol. II, p. 321.]

It was also alleged that that Petitioner was not running Crossroads in its entirety and Crossroads is listed in Student B's IEP. However, as noted above, Petitioner was running Crossroads to the best of her ability, without any clear directive from management. Petitioner believed she was following Student B's IEP.

B. Respondent Did Not Engage in Insubordination by Her Failure to Implement IEPs and BIPs

Respondent has failed to demonstrate by a preponderance of evidence that Petitioner willfully ignored directives or her duties as the EI teacher by failing to implement the student IEPs and BIPs.

The evidence establishes that the BIPs and IEPs were not updated for several months and that Petitioner began the process to update them in a timely fashion. The evidence further establishes that other staff members should have completed these documents in her absence; and by their failure to do so, shows that there was no set time frame established to complete these updates. In fact, Petitioner was promised at the beginning of the school year a substitute teacher would be provided so that she could update the BIPs, but that never occurred. And even upon her return from medical leave, a substitute teacher was not provided.

Moreover, Respondent provides examples where Petitioner fails to follow the BIPs, i.e., not using break cards with Student B. However, these examples fail to demonstrate that Petitioner meets the threshold of insubordination. She might have not fully implemented the BIPs, but to say that she was willfully violating the student's BIPs or IEPs, Respondent fails to demonstrate such a high threshold.

C. Respondent was Did Not Engage in Misconduct by Her Failure to Implement IEPs and BIPs

Respondent has failed to demonstrate by a preponderance of evidence that Petitioner's conduct was improper or a dereliction of her duty as an EI teacher by failing to implement the student IEPs and BIPs.

To reiterate, Petitioner believes that she was implementing the IEPs and BIPs. Respondent attempts to show examples where Petitioner fails to implement the IEPs or BIPs of the students. However, these isolated instances or mere inefficiencies are not be deemed within the meaning of misconduct.

Respondent has failed to demonstrate that Petitioner's actions with regard to the implementation of the students IEPs and BIPs amount to misconduct.

D. Respondent was not Dishonest by Her Failure to Implement IEPs and BIPs

Respondent also alleges that Petitioner was dishonest during the January 17, 2019 investigatory meeting. Specifically, the allegation is that Petitioner was untruthful in her answers to Respondent's questions during the meeting, as they related to questions regarding the BIPs and IEPs for students in the classroom.

Dishonesty is defined by Black's Law Dictionary as "[d]isposition to lie, cheat or defraud; untrustworthiness; lack of integrity." *Black's Law Dictionary* 421 (5th ed).

At the investigatory meeting, Petitioner was asked if she knew the contents of her students' IEPs and BIPs, to which she answered yes. [Jt. Exh. 2, p. 13-14.] Respondent argues that because Petitioner did know specifics of Student A's IEP, she must have been untruthful when she stated that she was familiar with the document. [Jt. Exh. 2, pp. 13-14.] However, it was over one month since Petitioner was placed on leave that the meeting occurred. During her administrative leave, Petitioner did not have access to student files and she was not given any opportunity to review the IEPs or BIPs prior to answering Respondent's questions. [Tr. Vol. IV, p. 94.] Petitioner had approximately 10 students in her classroom and all had IEPs, but not all of them had BIPs. [Tr. Vol. IV, p. 94.] Petitioner's inability to cite those documents, with so many students and with such specificity under those circumstances, it would be hard for any individual to remember such details. Respondent provided insufficient evidence demonstrating that Petitioner was intentionally dishonest during the investigatory meeting as it pertained to the questions surrounding the students' IEPs and BIPs.

Accordingly, Respondent has failed to demonstrate by a preponderance of evidence that Petitioner was dishonest during Respondent's investigation in regards to the implementation of the student IEPs and BIPs.

VII. Charge #6 - Insubordination and Dishonesty

For charge six, Respondent has the burden of showing by a preponderance of the evidence that Petitioner was both insubordinate and dishonest during her January 17, 2019 investigatory interview.

A. Investigatory Interview

On January 17, 2019, Mr. Dietzel, on behalf of Respondent, conducted an interview of Petitioner, along with Ms. Grigg and two District staff members, to address the allegations against Petitioner. Petitioner also had two union representatives present with her. At the interview, Ms. Grigg directed Petitioner to "answer all questions truthfully and without evasion and fully." [Tr. Vol. II, pp. 519-520.]

Respondent alleges that Petitioner was not truthful during the interview in these instances (i) she lied about reading and fully implementing students' IEPs and BIPs; (ii) she lied about "begging" for help on December 12, 2018; (iii) she lied about Student B pulling her shirt down to expose her breasts on December 12, 2018; (iv) she lied about not antagonizing Student B prior to the physical altercation on December 12, 2018; (v) she lied about not escorting Student B to the seclusion room by grabbing him under his armpits on December 12, 2018; (vi) she lied about not debriefing with other staff members after the incident with Student B on December 12, 2018; and (vii) she lied that her actions were 100 percent appropriate and in compliance with her training on December 12, 2018. [Jt. Exh. 2, p. 15.] Petitioner denies all of these allegations. [Pet's Br. pp. 56-57.]

i. Allegation that Petitioner Lied about Reading and Fully Implementing Students' IEPs and BIPs

Respondent alleges that Petitioner stated she was aware of, and fully implemented Student A's and B's IEP and BIP; however, follow-up questions made it evident that she was not truthful. [Jt. Exh. 2, p. 15; Tr. Vol. II, pp. 520-524.]

However, the undersigned already addressed this issue in section VI, D, of the *Conclusions of Law* section. To reiterate, Respondent provided insufficient evidence demonstrating that Petitioner was intentionally dishonest during the investigatory meeting as it pertained to the questions surrounding the students' IEPs and BIPs.

Accordingly, Respondent has failed to demonstrate by a preponderance of evidence that Petitioner was dishonest or insubordinate during Respondent's investigation in regard to the implementation of the student IEPs and BIPs.

ii. Allegation that Petitioner Lied about "Begging" for Help

Respondent alleges that Petitioner lied about that she begged other staff members to intervene during the situation with Student B on December 12, 2018. [Jt. Exh. 2, p. 15; Tr. Vol. II, p. 525.]

However, all three EA's that were present during the altercation deny hearing Petitioner beg for help. In fact, Mr. Van Tifflin asked Petitioner two or three times to let him help her, but she said to Mr. Van Tifflin, "I've got this[.]" Ms. Garchow acknowledged that Mr. Van Tifflin asked Petitioner if she needed help. [Tr. Vol. I, pp. 93-94 and 201; Tr. Vol. II, pp. 380-381; Tr. Vol. III, pp. 47-48.] .]

During cross-examination, Petitioner clarified her position as follows, "I did ask for assistance. Maybe "begged" wasn't the proper word, but again I'm not used to dealing with lawyers." [Tr. Vol. IV, p. 107.] She then appeared to state she was asking staff to help her with Student B prior to the altercation because he was not de-escalating. [Tr. Vol. IV, pp. 107-112.]

The evidence establishes that Petitioner was dishonest to Respondent during the investigatory interview in regard to her claim that she begged for help. Mr. Van Tifflin and Ms. Garchow provided credible testimony demonstrating that Petitioner never begged for helped during the physical altercation with Student B. Petitioner never "begged" or "asked" for help from the EA's.

The evidence further establishes that Petitioner willfully violated Respondent's directive to answer all questions truthfully during the investigative interview in regard to her being dishonest about "begging" for help from staff members.

iii. Allegation that Petitioner Lied about her Breasts being Exposed

Respondent alleges that Petitioner lied about her breasts being exposed during the situation with Student B on December 12, 2018. [Jt. Exh. 2, p. 15; Tr. Vol. II, pp. 524-525.]

Petitioner alleged that during the altercation of December 12, 2018, her breasts were exposed by Student B. She reported that Student B pulled her t-shirt down that was stretched past her bellybutton exposing her breasts. She indicated that she was wearing a bra and that the bra was not pulled down. She reported this information on the day of the incident to Mr. Garcia, School Service Worker at Linsday with the District, and Ms. Connors, the school secretary. She also reported this to school administrators during the January 17, 2019, investigatory interview. [Tr. Vol. I, p. 91; Tr. Vol. II, pp. 524-525; Tr. Vol. IV, pp. 139 and 160-161.]

In response, Respondent argued that no other witnesses saw Petitioner's breasts exposed during the incident, including Mr. Van Tifflin and Mr. McCann. [Tr. Vol. I, p. 230; Tr. Vo. II, p. 50.] Mr. Garcia stated Petitioner did not mention anything about her breasts being exposed. [Tr. Vol. I, pp. 247-248.] Ms. Grigg stated during the investigatory interview of January 17, 2019, she her breasts were exposed. However, in the subsequent investigation, no other staff member stated Petitioner's breasts were exposed. Moreover, no other staff members indicated that Petitioner told them that her breasts were exposed. [Tr. Vol. II, pp. 524-525.] Mr. Phelps did not recall being informed by Petitioner that her breasts were exposed during the altercation. Mr. Phelps did not recall observing the neck of Petitioner's t-shirt being stretched out. [Tr. Vol. I, p. 299.]

A review of Petitioner's photograph immediately following the altercation shows no indication that her t-shirt was stretched to the point that her breasts would have been exposed. [Pet. Exh. 1, p. 1.]

The evidence establishes that Petitioner was dishonest to Respondent during the investigatory interview in regard to her allegation that her breasts were exposed. Mr. Garcia stated Petitioner did not mention anything about Petitioner's breasts being exposed, despite Petitioner claiming she did. Moreover, no other witnesses, including the EA's who witnessed the altercation, did not see Petitioner's breasts ever being exposed. Taken all this information into consideration, the evidence sufficiently establishes that Petitioner was dishonest about her allegation that her breasts were exposed.

The evidence further establishes that Petitioner willfully violated Respondent's directive to answer all questions truthfully during the investigative interview in regard to her being dishonest about her breasts being exposed during the altercation with Student B.

iv. Allegation that Petitioner Lied about not Antagonizing Student B prior to the Physical Altercation

Respondent alleges that Petitioner lied about not antagonizing Student B prior to the physical altercation with Student B on December 12, 2018. [Jt. Exh. 2, p. 15; Tr. Vol. II, p. 526.]

Petitioner received extensive training on how to de-escalate tense student situations, including a summary of that training published on a poster that is hung on the wall immediately above where Student B sat. The poster reminds staff not to "pick up the rope," which meant that staff should not engage in a power struggle with a student. [Tr. Vol. I, p. 141; Resp. Exh. J, pp. 1-3.]

The record was clear that Petitioner's conduct of coming back to the classroom on December 12, 2018, and verbally engaging with Student B after he removed himself from the classroom area was inappropriate with Petitioner's de-escalation training. Staff agreed that she "picked up the rope" and engaged with Student B in a power struggle. [Tr. Vol. II, pp. 392-393; Tr. Vol. III, pp. 54-55 and 62.]

The evidence establishes that Petitioner was dishonest to Respondent during the investigatory interview in regard to her allegation that she did not antagonize Student B. The record is clear that Petitioner should not have come back to the classroom and verbally engage Student B, despite her training tell otherwise. Her actions clearly show that she did antagonize Student B prior to the physical altercation.

The evidence further establishes that Petitioner willfully violated Respondent's directive to answer all questions truthfully during the investigative interview in regard to her being dishonest about her claim that she did not antagonize Student B prior to the physical altercation.

v. Allegation that Petitioner Lied about how she Escorted Student B to the Seclusion Room

Respondent alleges that Petitioner lied about how she escorted Student B to the seclusion room on December 12, 2018. [Jt. Exh. 2, p. 15; Tr. Vol. II, p. 526.]

Petitioner claimed that she dragged Student B by the armpits. [Tr. Vol. II, p. 526.] However, no other witness confirmed that she dragged Student B by the armpits. [Tr. Vol. I, p. 201; Tr. Vol. II, p. 382; Tr. Vol. III, pp. 44-45.]

Moreover, the undersigned found that Ms. Garchow and Mr. Van Tifflin credibly testified that Petitioner physically held Student B's body against the floor, pushed his head into the floor at least two or three times, and then dragged him into the seclusion room by his wrists, while his butt and legs scraped on the floor.

The evidence establishes that Petitioner was dishonest to Respondent during the investigatory interview in regard to how she escorted Student B to the seclusion room. The record is clear that Petitioner dragged Student B by his wrists, not his armpits as Petitioner claimed.

The evidence further establishes that Petitioner willfully violated Respondent's directive to answer all questions truthfully during the investigative interview in regard to how she escorted Student B to the seclusion room.

vi. Allegation that Petitioner Lied about not Briefing with other Staff Members after the Incident with Student B

Respondent alleges that Petitioner lied about not briefing with other staff members after the incident with Student B. [Jt. Exh. 2, p. 15.]

Petitioner testified that she was unable to debrief staff after the incident because she was placed on administrative leave prior to the debriefing. [Tr. Vol. IV, p. 92.]

The undersigned finds that Petitioner provided a reasonable explanation as to why she was unable to debrief the other staff. Once Petitioner was placed on administrative leave, she was precluded from being able to debrief the staff.

Accordingly, Respondent has failed to demonstrate by a preponderance of evidence that Petitioner was dishonest or insubordinate during Respondent's investigation in regard Petitioner not debriefing other staff members.

vii. Allegation that her Actions were Appropriate and in Compliance with her Training on December 12, 2018

Respondent alleges that Petitioner lied about her actions were appropriate and in compliance with her training on December 12, 2018. [Jt. Exh. 2, p. 15; Tr. Vol. II, p. 526.]

Petitioner received extensive training on crisis prevention and seclusion and restraint. [Tr. Vol. I, pp. 30-32 and 35; Tr. Vol. II, p. 506; Tr. Vol. II, pp. 45-46.]

Petitioner's conduct of straddling Student B, restraining his head against the floor, pushing his head into the floor, and then physically dragging him by the wrists into the seclusion room violated crisis prevention and seclusion and restraint training. [Tr. Vol. I, pp. 89, 203-204, 262; Tr. Vol. II, pp. 393-394 and 481; Tr. Vol. III, p. 152.]

It's unclear how Petitioner can truly believe her conduct was appropriate on December 12, 2018. The record shows her actions were clearly inappropriate. As such, Respondent sufficiently demonstrated that Petitioner was dishonest to Respondent during the investigatory interview in regard to her claim that her actions were appropriate and in compliance with her training on December 12, 2018.

The evidence further establishes that Petitioner willfully violated Respondent's directive to answer all questions truthfully during the investigative interview in regard to her claim that her actions were appropriate and in compliance with her training on December 12, 2018.

B. Insubordination and Dishonesty – Investigative Interview

For charge six, Respondent, in part, has proven by a preponderance of the evidence that Petitioner was both insubordinate and dishonest during her January 17, 2019 investigatory interview. Specifically, the undersigned found Petitioner was dishonest and insubordinate for the following incidents: (i) "begging" for help on December 12, 2018; (ii) Student B pulling her shirt down to expose her breasts on December 12, 2018; (iii) antagonizing Student B prior to the physical altercation on December 12, 2018; (iv) she escorted Student B to the seclusion room by grabbing him under his armpits; and (v) her actions were 100 percent appropriate and in compliance with her training on December 12, 2018.

VIII. Appropriate Discipline

A. Respondent Met its Burden on Several of the Charges

The Commission has held that it is their responsibility to review the quality and quantity of the evidence and to determine if the decision to discharge Petitioner is the result of a deliberate, principled reasoning process supported by evidence. Additionally, as noted in *Cona*, the Commission held even if there are factors that would support a less drastic level of discipline than that chosen by a controlling board, "[O]ur duty is not to fashion the penalty that we ourselves would prefer but to review the controlling board's decision for arbitrariness and capriciousness."

Here, the undersigned determined that Petitioner violated Charges 1, 2, 3, and 6 (in part). The undersigned determined that Petitioner did not violate Charges 4, 5, and 6 (in part).

Based on a careful review of the evidence in this case, it cannot reasonably be said that Petitioner's discharge decision was based on whim or caprice or that it was made without reasonable consideration of evidence. Nor does the record support a finding that the controlling board failed to consider important evidence or that it failed to appreciate the significance of evidence.

B. Irrespective of the Board Potentially Overlooking Evidence or Err in Appreciating Evidence, its Decision to Terminate Petitioner was Not Arbitrary nor Capricious

Petitioner argues that Respondent's decision to terminate her was arbitrary and capricious because "relevant and potentially exculpatory evidence was deliberately withheld from the controlling Board" when it withheld the picture of Petitioner's neck, which was scratched following her physical altercation with Student B. [Pet's Br. pp. 57-58; Pet. Exh. 1, p. 1.] The Commission may find a discharge decision arbitrary or

capricious if the District "overlooked important evidence or erred in appreciating the significance of evidence." *Cona* (11-61).

Petitioner may have suffered an injury at some point during her physical altercation with Student B. However, the entire physical altercation resulted because of Petitioner's actions. Regardless of the nature of the incident, Petitioner's excessive force cannot be excused. The fact remains that Petitioner's conduct of straddling Student B, restraining his head against the floor, pushing his head into the floor, and then physically dragging him by the wrists into the seclusion room, was in violation of the rules and regulations and therefore, an appropriate decision by the Board to terminate her employment.

Accordingly, the Board did not overlook important evidence or err in appreciating evidence, and its decision to terminate Petitioner was not arbitrary or capricious.

C. The Board's Decision was Not Arbitrary nor Capricious

In this case, the Board determined that Petitioner's actions violated statutes, rules, and regulations, resulting in the decision to terminate her employment. The undersigned agrees. Here, the decision to terminate Petitioner's employment was the result of a deliberate, principled reasoned process supported by evidence.

i. Discharge for Physically Aggressive, Disrespectful, and Demeaning Conduct

The Commission has upheld the discharge for teachers engaging in conduct similar to Petitioner's conduct. In *Hill v. Potterville Public Schools* (16-14), the Commission determined that it was not arbitrary or capricious for a district to discharge a teacher who dragged a student by her ankles along the floor from the cafeteria to the adjacent hallway. The Commission stated that the teacher's actions exposed the Student "to an obvious risk of injury, violated her right to be treated with respect and kindness, and robbed her of the degree of dignity to which she was entitled." In the *Hill* case, it also cited *Sprowls v Board of Education of the Belding Area Schools* (94-56), which stated "teacher's actions, not his intent, were at issue and that his conduct amounted to the use of unreasonable physical force regardless of his motives."

Similarly, in this case, Petitioner exposed Student B to risk of injury when she straddled him, restrained his head against the floor, pushing his head into the floor, and then physically dragging him by the wrists into the seclusion room. Petitioner also exposed Student A to injury when she used her foot to push his butt across the threshold into the seclusion room.

Additionally, the Commission has also upheld the discharge of teachers who call students name or make inappropriate comments to them. For example, in *Vollbach v*

East Jordan Public Schools (11-53; 11-63), the Commission upheld the teacher's discharge when she belittled a student by asking if he was in the special education class.

Similarly, in this case, Petitioner said she did not like Student B, an EI student, in front of the classroom. She also said the same of Student B in front of the classroom that she hoped the "po po" would deal with him. And finally, she told another student if he kept acting like this, he would go to jail. These comments, especially directed at elementary-school aged EI students, were inappropriate and warrant discharge.

ii. Discharge for Insubordination

The Commission has also upheld discharge for insubordinate teachers. As noted previously, the Commission has established that "the general rule that insubordination involves willful violation of a rule, directive or policy which is known by the actor and which has been evenly enforced." *Davis* (03-9).

The record is clear that Petitioner violated Respondent's policies and the Code of Ethics. Her conduct towards Student A and B violated Respondent's corporal punishment policy and she violated the Board's seclusion and restraint policy. Her inappropriate comments and physical abusive behavior towards Student A and B violated the Board's policy and Code of Ethics. In the end, there were multiple examples in which Petitioner's actions resulted in insubordination.

iii. Discharge for Illegal Conduct and Dishonesty

A teacher may also be discharge for engaging in unlawful conduct, even if there is no conviction. For example, in *Langworthy v Reed City Area Public Schools* (07-40), the Commission stated that while illegal conduct may constitute grounds for termination, a conviction is not required. The Commission stated, "[i]t is the appellant's conduct that is at issue, not his criminal record." The Commission also found in *Osterman v Board of Education of Stephenson Area Public Schools* (01-21), that lying during an investigatory interview also provides grounds for termination.

Here, Petitioner's conduct violated the Code, Child Protection Law, and other statutes (i.e., assault and battery). Moreover, the undersigned found that she was dishonest during the investigative interview for several of the factual allegations. For these reasons, her discharge was not arbitrary or capricious.

D. The Szopo Factors

Because the undersigned has found that the Board's decision on several of charges was the result of deliberate, principled reasoning based on evidence as required by MCL 38.101(1), the review of the Controlling board's decision ends.

Both parties addressed the *Szopo*[33] factors in their post-hearing briefs in regard to determining if any of factors support Respondent's decision to terminate Petitioner. [Pet's Br. pp. 58-64; Resp's Br. pp. 42-47.] The Commission's case precedent suggests that this Tribunal does not need to delve into the *Szopo* factors, even if the undersigned does not find that Petitioner was in violation of every charge alleged by Respondent. The fact remains that the undersigned did find Petitioner in violation of Charges 1, 2, 3, and 6 (in part), which means the discharge was appropriate and no further analysis of the *Szopo* factors is necessary. As the Commission recently stated in the *ReVoir v. Ann Arbor Public Schools* (18-5) case, "[o]nce a determination is made that a discharge decision was the result of a deliberate, principled, reasoned process supported by evidence, the inquiry that this Commission is statutorily authorized to conduct ends." After *Revoir,* it is clear based on the Commission's case precedent, that the undersigned need not address the *Szopo* factors.[34]

CONCLUSION

A. Respondent did establish, by a preponderance of the evidence, that Petitioner violated (i) Charge 1 (misconduct and insubordination); (ii) Charge 2 (misconduct and insubordination); (iii) Charge 3 (misconduct); and (iv) Charge 6, in part (insubordination and dishonesty).

B. Respondent did not establish, by a preponderance of the evidence, that Petitioner violated Charge 4 (unprofessional conduct and insubordination); (ii) Charge 5 (misconduct, insubordination, and dishonesty); and (iii) Charge 6, in part (insubordination and dishonesty).

C. Respondent did establish, by a preponderance of the evidence, that the Board's decision to terminate Petitioner's employment is not arbitrary or capricious.

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[33] See *Szopo v Richmond Community Schools Board of Education* (93-60) (factors for determining level of discipline for misconduct).

[34] See *Green v Reeths-Puffer Public Schools* (16-13); *Mertz v. Byron Center Public Schools Board of Education* (17-9); *Lefebvre v. Norway-Vulcan Area Schools* (18-1); and *ReVoir v. Ann Arbor Public Schools (18-5).*

ORDER

IT IS ORDERED that Respondent's discharge of Petitioner Kendra Nichols is appropriate and she is hereby discharged.

EXCEPTIONS

A party may file a statement of exceptions to the decision and order or to any part of the record or proceedings including rulings on motions or objections, with the State Tenure Commission. The statement of exceptions must be accompanied by a brief in support of the exceptions and filed in accordance with Commission Rules. The brief and statement of exceptions must be served upon each of the parties within the time limit for filing exceptions and brief.

A party may file a statement of cross-exceptions or a statement in support of the preliminary decision, accompanied by a brief, with the State Tenure Commission, not later than 10 days after being served with the other party's exceptions and brief. MCL 38.71 *et seq.* Commission Rules require that arguments in exceptions/cross-exceptions briefs must correspond to the order of exceptions/cross-exceptions and that the argument must be prefaced by the exception/cross-exception which it addresses. Commission Rule 46; 1998-2000 AC, R 38.176.

The deadline for filing exceptions and brief is **Monday, September 30, 2019.** Exceptions must be received by the Commission before the close of business on the last day of this time limit. Exceptions can be electronically filed with the Commission at MDE-AdminLaw@michigan.gov. Exceptions can also be sent to the following address:

Office of Administrative Law
608 West Allegan Street
P.O. Box 30008
Lansing, Michigan 48909.

A matter not included in the statement of exceptions or statement of cross-exceptions is considered waived and cannot be heard before the Commission or on appeal to the Court of Appeals.

If exceptions are not timely filed, this decision and order becomes the State Tenure Commission's final decision and order.

Eric J. Feldman
Administrative Law Judge

PROOF OF SERVICE

I certify that I served a copy the foregoing document upon all parties and/or attorneys to their last-known address in the manner specified below, this 9th day of September, 2019.

P. Moore
Michigan Office of Administrative Hearings and Rules

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