STATE OF MICHIGAN
STATE TENURE COMMISSION

Kendra Nichols,
Appellant

v

Docket No. 19-7

Bay City Public Schools,
Appellee

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DECISION AND ORDER ON EXCEPTIONS

On March 21, 2019, appellant Kendra Nichols filed a claim of appeal challenging the February 25, 2019 decision of appellee Bay City Public Schools to discharge her. There was a hearing on the claim of appeal on June 4, 5, 6, and 7, 2019, before Administrative Law Judge Eric J. Feldman (ALJ).

The ALJ issued a preliminary decision and order (PDO) on September 9, 2019, finding that appellee proved some of the charged conduct and that the decision to discharge appellant was not based on a reason that was arbitrary or capricious. Both parties filed exceptions to the PDO, with supporting briefs, on

September 30, 2019, and cross exceptions, with supporting briefs, on October 10, 2019.

DISCUSSION

Since 2001, appellant Kendra Nichols has held a Michigan teaching certificate that is valid for all subjects in grades K-5 and all subjects in a self-contained classroom in grades K-8, with an emotional impairment (grades K-12) endorsement. Appellee Bay City Public Schools has employed her as a special education teacher since 2001. In 2004, she began teaching at appellee's Linsday Elementary School in a classroom for students who have emotional impairments. The Linsday program for students with emotional impairments was split into two classrooms in 2005 and, since that time, appellant has been assigned to the K-3 classroom and another teacher has been assigned to the classroom that serves students in the program who are in fourth and fifth grades. In the 2018-2019 school year, the staff in appellant's classroom always included two educational assistants whose responsibilities included helping students with assignments, leading small groups of students, escorting students to seclusion rooms, helping students with bathroom breaks and snacks, and generally assisting appellant. (Tr, Vol I, pp 20-21, 24-25, 188-189; Vol II, p 354; Vol IV, pp 37-40).

The two Linsday Elementary School classrooms for students with emotional impairments are connected by a hallway that is approximately six feet wide. Along the hallway are four rooms where students are placed for time-out and seclusion. There is a door on each of those rooms that opens into the hallway. If the door to the room is left open, the student is considered to be in time-out; when the door is held closed by a staff member, the student is considered to be in seclusion. There

is a desk in the hallway. (Tr, Vol I, pp 26, 62, 64, 198; Vol III, p 17; Vol IV, pp 71-72, 99-100; Exhibit J). For purposes of this decision, we will refer to the rooms as seclusion rooms.

Relevant to some of the charged conduct is 2016 PA 394, MCL 380.1307 to 380.1307h, which, effective March 29, 2017, amended the Revised School Code to provide for a uniform seclusion and restraint policy that, among other objectives, "[e]nsures that seclusion and physical restraint are used [in public schools] 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). Subject to specific exceptions, "restraint" means "an action that prevents or significantly restricts a pupil's movement" and "seclusion" means "the confinement of a pupil in a room or other space from which the pupil is physically prevented from leaving." MCL 380.1307h(p) and (s). The public act directed the Department of Education to develop a uniform state policy and directed boards of school districts to adopt and implement local policies consistent with the state policy. MCL 380.1307a.[1] The uniform policy prohibits corporal punishment, as defined in MCL 380.1312;[2] seclusion (except emergency seclusion); and physical

[1] On March 14, 2017, the State Board of Education approved the uniform policy developed by the Department of Education. https://www.michigan.gov/documents/mde/PolicyForSeclusion-Restraint_564940_7.pdf.

On August 23, 2017, the Board of Education of Bay City Public Schools adopted Policy 5630.01, which is consistent with the uniform policy. (Joint Exhibit 2).

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

restraint (except emergency physical restraint). MCL 380.1307b(a), (d), and (j). Requirements related to the emergency use of seclusion and physical restraint are set forth in MCL 380.1307c, which provides in part as follows.

> The state policy under section 1307a shall include at least all of the following provisions concerning use of emergency seclusion and emergency physical restraint:
> (a) Emergency seclusion and emergency physical restraint may be used only under emergency situations and only if essential to providing for the safety of the pupil or safety of another.
> (b) Emergency seclusion and emergency physical restraint may not be used in place of appropriate less restrictive interventions.
> (c) Emergency seclusion and emergency physical restraint shall be performed in a manner that, based on research and evidence, is safe, appropriate, and proportionate to and sensitive to the pupil's severity of behavior, chronological and developmental age, physical size, gender, physical condition, medical condition, psychiatric condition, and personal history, including any history of physical or sexual abuse or other trauma.
> (d) A requirement that school personnel shall call key identified personnel for help from within the school building either immediately at the onset of an emergency situation or, if it is reasonable under the particular circumstances for school personnel to believe that diverting their attention to calling for help would increase the risk to the safety of the pupil or to the safety of others, as soon as possible once the circumstances no longer support such a belief.
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> ***
>
> (f) Emergency seclusion should not be used any longer than necessary, based on research and evidence, to allow a pupil to regain control of his or her behavior to the point that the emergency situation necessitating the use of emergency seclusion is ended and generally no longer than 15 minutes for an elementary school pupil or 20 minutes for a middle school or high school pupil. If an emergency seclusion lasts longer than 15 minutes for an elementary school pupil or 20 minutes for a middle school or high school pupil, all of the following are required:
> (i) Additional support, which may include a change of staff, or introducing a nurse, specialist, or additional key identified personnel.

> (ii) Documentation to explain the extension beyond the time limit.
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> (h) While using emergency seclusion or emergency physical restraint, school personnel must do all of the following:
> (i) Involve key identified personnel to protect the care, welfare, dignity, and safety of the pupil.
> (ii) Continually observe the pupil in emergency seclusion or emergency physical restraint for indications of physical distress and seek medical assistance if there is a concern.
> (iii) Document observations.

Documentation and reporting requirements regarding seclusion and restraint and requirements regarding the training of school personnel, including instruction about the use of emergency seclusion and emergency physical restraint, are found in MCL 380.1307d and 380.1307g.

The six charges were based on appellant's conduct during the first semester of the 2018-2019 school year. (Joint Exhibit 2). After working for a few weeks at the beginning of that school year, appellant went on medical leave in September. She returned to Linsday Elementary School in mid-November and worked until December 12, 2018, when she was placed on administrative leave. She worked for a total of about 30 days during the school year. (Tr, Vol I, pp 21-23; Vol II, pp 355-356, 536).

At issue before this Commission are findings related to several of the charges filed against appellant. In brief, the charges that are the subject of exceptions are the following.

> Charge 1: Misconduct and insubordination: corporal punishment, assault, battery, and abuse of students

While placing one of her students (Student A,[3] who was a seven or eight-year-old second grader[4]) in a seclusion room on December 10, 2018, appellant placed her foot on the student's buttocks and pushed or kicked him into the room, saying "That's not CPI[5], but. . ." Student A was held in the seclusion room on that day for 126 consecutive minutes without additional interventions or supports.

On December 12, 2018, appellant intentionally provoked another of her students (Student B, who was an eight-year old second grade student[6]) by taunting him and yelling in his face. Student B lunged at appellant, causing them both to fall to the floor, where appellant straddled his body with hers, held him to the ground, and pushed his head into the floor at least three times. After refusing staff's offers of assistance, appellant stood up and directed Student B into a seclusion room. When he refused, appellant said words similar to, "Then I will fucking drag you," and she dragged him six to eight feet into a seclusion room by his wrists. He remained in the seclusion room for 53 consecutive minutes without additional interventions or supports.

Appellant's conduct was contrary to her extensive training on the use of seclusion and restraint and nonviolent crisis management; it constituted criminal battery, corporal punishment, and child abuse; and it violated district policies and ethical standards.[7]

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[3] For purposes of privacy, we refer to the involved students as "Student A" and "Student B."

[4] (Tr, Vol I, pp 92-93).

[5] CPI is crisis prevention and intervention training provided by the district regarding how to respond safely and appropriately to students' challenging or dangerous behavior, including how to escort students properly to a seclusion room, how to avoid situations where seclusion or restraint is necessary, and generally how to help students cool down. (Tr, Vol I, pp 30-31, 190-191).

[6] (Tr, Vol I, pp 99-100).

[7] In addition to Board Policy 5630.01 and various Michigan statutes, the charge cited:

> Board Policy G4055: Employees' conduct in school "shall be above reproach" and "shall contribute to a high morale in the school and a wholesome school reputation." (Exhibit Q).
>
> Board Policy G4080: Staff shall regard each student as an individual, and shall treat each student with respect, courtesy, and consideration. (Id.).

Charge 2: Misconduct and insubordination: disregard for seclusion and restraint laws, policy, and training

> The conduct alleged in Charge 1 and other earlier placements of Student B in a seclusion room when his behavior did not pose an imminent safety threat violated 2016 PA 394 and Policy 5630.01.[8]

Charge 3: Misconduct: unprofessional and harmful conduct toward students

> Appellant engaged in unprofessional and harmful conduct toward students and thus violated board policies, as evidenced by the conduct alleged in the first two charges, by her statement to Student B that she did not like him, by her statement to coworkers that she hoped Student B would be arrested by the police, and by her intentional provocation of Student B.

Charge 5: Misconduct, insubordination, and dishonesty: failure to implement IEPs [individualized education programs] and BIPs [behavior improvement plans]

> Appellant engaged in misconduct and insubordination and was dishonest in that she failed to implement Student A's and Student B's BIPs and, after being directed to be truthful, she was not truthful about her knowledge of their IEPs and BIPs during a January 17, 2019 interview.

Charge 6:

> Appellant was insubordinate and dishonest in that several of her statements during the January 17, 2019 interview (in addition to those described in the fifth charge) were not true.

We will consider appellant's six exceptions in the order we deem appropriate.

> Michigan Professional Educator's Code of Ethics: Teachers shall "respect the inherent dignity and worth of each individual" and "behave in a trustworthy manner," "adhere to acceptable social practices [and] current state law," and "exercise sound professional judgment." (Exhibit P). (The Department of Education updated the code of ethics in the spring of 2019. See Michigan Code of Educational Ethics at: https://www.michigan.gov/documents/mde/Code_of_Ethics_653130_7.pdf.)

[8] The public act and policy, which address seclusion and restraint, are described *supra*.

We begin with consideration of appellant's second exception, which challenges the ALJ's determination that appellee proved the first charge. In addition to appellant, the eyewitnesses to some or all of the conduct alleged in the first charge who testified at the hearing were appellant's educational assistants Elizabeth Garchow, Thad Van Tifflin, and Kevin McCann.[9] During the time in question, Ms. Garchow was assigned to appellant's classroom all day, while Mr. Van Tifflin and Mr. McCann alternated between appellant's classroom and other assignments. (Tr, Vol I, pp 24-25, 189-190; Vol II, p 355).

Appellant's argument in support of this exception is an attack on the credibility of Ms. Garchow, upon whose testimony the ALJ substantially relied in finding that appellee proved the first charge. (PDO, pp 29-31). Appellant and Ms. Garchow were the only eyewitnesses to Student A's December 10 seclusion who testified at the hearing. The ALJ found that Ms. Garchow testified credibly that appellant placed her foot on Student A's buttocks, pushed Student A into the seclusion room, and said, "It's not CPI, but. . ." (Tr, Vol II, pp 373-374). (PDO, pp 14, 29). Appellant denied that she said this to Student A. (Tr, Vol IV, pp 84-85). Her description of the incident was markedly different from Ms. Garchow's description.

> Initially, I had escorted him back, and then after I had placed him in the time-out room. . .and I reminded him of the procedure [for exiting], and at that time he was calm enough for the door to even be open because he had just sat down after he was in the room, so I—the door was cracked. (Tr, Vol IV, pp 84-85).

[9] Linsday Elementary School Principal Casey Phelps saw Student B in a seclusion room on December 12 but he did not witness the student's encounter with appellant that led to his seclusion.

Ms. Garchow also testified about the December 12, 2018 verbal and physical altercation between appellant and Student B. According to Ms. Garchow, Student B was sitting at the desk in the hallway when appellant entered the hallway and "bent over and was in [Student B's] face." Student B and appellant verbally confronted each other and the two of them ended up on the floor, where, according to Ms. Garchow, appellant was on top of Student B and pushed his head into the floor three times as he struggled to push her off of him. Ms. Garchow further testified that, while appellant and Student B were on the floor, appellant stated, "I will fucking drag you," before she dragged Student B to the seclusion room by his wrists, with his back, legs, and buttocks dragging on the floor. According to Ms. Garchow, she and Mr. Van Tifflin were the closest witnesses to this incident, during which appellant rejected Mr. Van Tifflin's repeated offers of assistance. Mr. McCann was farther away. (Tr, Vol II, pp 375-383, 405-412, 416-418). As appellant admits (Appellant's brief in support of exceptions, p 17), Mr. Van Tifflin's description of the altercation was similar to that of Ms. Garchow. (Tr, Vol I, pp 196-204, 206, 226-227). Ms. Garchow testified that, while she and Mr. Van Tifflin were standing in the hallway, they talked about how they "couldn't believe what had just happened," but she denied that she spoke with Mr. Van Tifflin to make sure their descriptions of the incident were consistent. (Tr, Vol II, p 387). According to Mr. Van Tifflin, Ms. Garchow had a better view of the incident than he did and Mr. McCann did not have a good view of it. (Tr, Vol I, pp 225, 229).

Either while appellant was dragging Student B to the seclusion room or immediately thereafter, Ms. Garchow texted Linsday Elementary School Principal Casey Phelps to complain about what she considered appellant's extremely

dangerous conduct. (Tr, Vol I, pp 294-295; Vol II, pp 384-385; Exhibit I). A short while later on that day, she met with Jennifer Grigg, Bay City Public Schools director of human resources; Jessica Brunsell, Bay-Arenac Intermediate School District special education supervisor; Mr. Phelps; and other administrative staff. She told them about the altercation between appellant and Student B. She also informed them about the December 10 incident involving Student A. (Tr, Vol I, pp 137, 305 ; Vol II, pp 374, 386-387, 396, 410-412, 514-517, 527-528).

Appellant argues that Ms. Garchow cannot be believed because she "blatantly lied" in her text message to Mr. Phelps about the December 12 incident (Exhibit I) when she wrote that appellant had pulled Student B out of the hallway desk before the two of them ended up on the floor. (Appellant's brief in support of exceptions, p 16). Appellant also asserts that, "[I]t would not be unrealistic to think [Ms. Garchow and Mr. Van Tifflin] probably said something to each other" about the December 12 incident and that, "[I]t is not unreasonable to assert that they probably influenced each other's perception of the event." (*Id*., p 17). In contrast to the testimony of Ms. Garchow and Mr. Van Tifflin, argues appellant, was the testimony of Mr. McCann, who, according to appellant, "is the only witness who can say that he saw the entire [December 12] incident, from beginning to end, and that he had a clear view of it the entire time." (*Id*.) In further support of her attack on Ms. Garchow's credibility, appellant notes that only Ms. Garchow testified that appellant uttered an obscene statement about dragging Student B to the seclusion room.

Contrary to appellant's assertion, we do not find that Ms. Garchow "blatantly lied" in her December 12 text message to Mr. Phelps when she wrote that appellant

pulled Student B out of his desk and that her testimony was therefore as a whole incredible. At the hearing, she retracted that statement, testifying that, in fact, she did not see how appellant and Student B ended up on the floor. She testified that she wrote her text message immediately after appellant's altercation with Student B and she characterized it as poorly worded during a time of extreme stress. When she met with Ms. Grigg and others shortly after the incident on December 12 and when she was interviewed by Ms. Grigg and the district's counsel in January 2019, she clearly stated that she did not see how Student B got out of his desk on December 12. (Tr, Vol II, pp 397-398, 410-411, 418-419, 517-518, 552-553). Based on this evidence, we agree with the ALJ that her text statement did not render her testimony wholly incredible. (PDO, p 31). We also reject appellant's purely speculative suggestion that Ms. Garchow's and Mr. Van Tifflin's testimony was tainted because they might have talked with each other about the December 12 incident. Ms. Garchow denied any attempt to ensure that she and Mr. Van Tifflin described the incident similarly and we are not persuaded that the ALJ erred in crediting her testimony in that regard. Contrary to appellant's argument, appellee's burden was not to disprove everything that it might "not be unrealistic to think," or that it might "not [be] unreasonable to assert." Appellee's burden was to prove the charges by a preponderance of the evidence, not to disprove every possible, speculative scenario. *Stangeis v Pontiac, Oxford & Northern Railroad Co.*, 266 Mich 224 (1934) (proof by preponderance of evidence does not require exclusion of all speculative possibilities). Nor are we persuaded that the fact that Ms. Garchow was the only witness who testified that she heard appellant utter an obscene statement to Student B on December 12 rendered her testimony about that statement

unbelievable. As we held in *Harris v Ann Arbor Public Schools* (11-3), lv den unpublished order of the Court of Appeals, issued December 14, 2012 (Docket No. 309788), the fact that a witness's testimony is uncorroborated does not compel a finding that it is incredible. In that case, there was no evidence that the witness did not testify truthfully and we noted that the subject of the witness's testimony was so disturbing and memorable to the witness that he reported it to his parents. So too in this case, there is nothing in the record that suggests that Ms. Garchow had a motive to, or did, testify untruthfully. On the contrary, she was so upset by what she witnessed that she reported it that same day to school authorities.

The ALJ had the opportunity to view the witnesses and to hear their testimony. In fact, the ALJ questioned many witnesses, including Ms. Garchow. (Tr, Vol II, pp 396-398). He explained that he based his finding of the credibility of her testimony on "her demeanor, tonal quality, speech patterns, etc." (PDO, p 30). The ALJ was in a superior position to determine witness credibility based on such factors and, in accordance with longstanding practice, we give due deference to his findings. *Harris*, *supra*. In our judgment, the ALJ reasonably found that Ms. Garchow and Mr. Van Tifflin were in better positions than Mr. McCann to witness what happened when appellant and Student B were on the floor of the hallway on December 12 and we find no error in the ALJ's reliance on Ms. Garchow's and Mr. Van Tifflin's consistent testimony rather than on Mr. McCann's testimony that he did not witness some of the conduct about which both Ms. Garchow and Mr. Van Tifflin testified (PDO, pp 17, 30). Nor did the ALJ err in crediting Ms. Garchow's and Mr. Van Tifflin's testimony over appellant's testimony that she did not hold Student B's

head or face while the two of them were on the floor on December 12 and that Mr. Van Tifflin did not offer to help her during that incident (Tr, Vol I, pp 87-88).

For these reasons, we deny appellant's second exception.

Appellant's third exception challenges the ALJ's determination that appellee proved the second charge. Appellant does not dispute that she placed Student A in seclusion on December 10, that she placed Student B in seclusion on December 10 and December 12, and that each of those seclusions lasted significantly longer than 15 minutes.

According to the observation log initialed by appellant on December 10, Student A was in seclusion for a total of approximately 1 ½ hours on that day.[10] (Exhibit A). Appellant admitted that she did not ensure that supports were available to help him calm his behavior during that time. She further admitted that Student A's December 10 seclusion was not consistent with required seclusion procedures. (Tr, Vol I, pp 64-70; Exhibit A). Student B was in seclusion on December 10 from 1:31 p.m. to 1:58 p.m. (27 minutes) and from 2:13 p.m. to 3:01 p.m. (48 minutes) and on December 12 from 2:12 p.m. to 2:44 p.m. (32 minutes) and from 2:49 p.m. to 3:05 p.m. (16 minutes). Appellant admitted that the seclusions of Student B did not reflect proper seclusion and restraint or CPI procedures. (Tr, Vol I, pp 74-78, 88; Exhibit B).

In her defense, appellant argues that both Student A and Student B "were in seclusion for a reason, that their behavior presented a danger to themselves and to

[10] According to the observation log (Exhibit A), Student A was placed in a seclusion room at 12:34 p.m. and he did not return to the classroom until 2:40 p.m. The observation log shows that the door was open a few times during that time and that Student A was in seclusion for about 1 ½ hours.

others." (Appellant's brief in support of exceptions, p 20). She asserts that she "could not simply end the seclusions because fifteen minutes had passed." (*Id*.) At the hearing, she characterized her December 12 conduct toward Student B as holding him "accountable" for his behavior. (Tr, Vol I, p 96). We are not persuaded that these arguments posit viable defenses to the charge that appellant violated legal requirements. The seclusion of an elementary student is allowed only in emergencies and should not last longer than 15 minutes. In general, if the emergency seclusion of an elementary student lasts longer than 15 minutes, there must be "additional support, which may include a change of staff, or introducing a nurse, specialist, or additional key identified personnel." MCL 380.1307c(f)(i). Even if, as appellant argues, Student A's and Student B's behavior at the times in question could reasonably have been considered as dangerous to themselves and others, appellant did not provide the required additional support for them during the seclusions that lasted well beyond the 15-minute limit and she provides no excuse for that dereliction of her responsibility.

In further support of her insistence that her conduct was appropriate, appellant points to the testimony of Jennifer Provoast, a special education teacher employed by Bay-Arenac Intermediate School District who was the upper elementary special education teacher at Linsday Elementary School for 13 years until the end of the 2017-2018 school year. (Tr, Vol IV, pp 8-9, 19). Appellant argues that Ms. Provoast's testimony showed that it is sometimes impossible to comply perfectly with standards regarding the restraint and transport of students and that sometimes it is best to get students into a safe place as quickly as possible, even if it means dragging them. We are not persuaded by this argument.

Ms. Provoast's testimony does not support a finding that the lengthy seclusions of Student A and Student B or appellant's manner of placing Student A in a seclusion room on December 10 or of transporting Student B to a seclusion room on December 12 were appropriate under any understanding of legal requirements. We find that, even if strict adherence to seclusion and restraint requirements is not always possible, appellant's behavior on December 10 and December 12 was far outside any reasonable understanding of proper conduct.

According to appellant, Mr. Phelps' arrival on the scene on both December 10 and December 12 while Student A and Student B were in seclusion rooms showed that the "additional support" required by MCL 380.1307c(f)(i) and Policy 5630.01 was provided. Mr. Phelps testified that he "probably stopped in" during Student A's December 10 seclusion. (Tr, Vol II, p 340). This evidence, which does not even establish how long Mr. Phelps was in the area of appellant's classroom at the time in question, does not support a finding that appellant acted to ensure that additional support was provided for Student A during his lengthy seclusion. In addition, on December 12, Mr. Phelps was present for only about the last five minutes of Student B's lengthy seclusion. (Tr, Vol I, p 297; Exhibit B).[11]

The ALJ carefully considered the entire record and reasonably determined that appellant's December 10 and December 12, 2018 conduct vis-à-vis Student A

[11] After dragging Student B to a seclusion room on December 12, appellant went to the office of Linsday school social worker Jacob Garcia. Mr. Garcia went to appellant's classroom while Student B was still in seclusion but he testified that he only went there to cover until appellant could return. (Tr, Vol I, pp 246-250). There was no evidence of how long he was there and appellant does not argue in support of this exception that his presence constituted the required "additional support."

and Student B was prohibited by the Revised School Code and Policy 5630.01. (PDO, pp 13-15, 33-38). We therefore deny appellant's third exception.

In her fourth exception, appellant challenges the ALJ's determination that appellee proved the third charge. The ALJ found that the conduct that appellee proved in support of the first two charges violated district policies prohibiting corporal punishment and setting forth seclusion and restraint requirements and general expectations for staff conduct. In addition, the ALJ found that appellant's conduct violated the code of ethics. See footnote 7, *supra*. Additional conduct proved by appellee that violated these policies and the code of ethics included appellant's generally negative treatment of Student B compared to her treatment of other students, appellant's statement in the presence of students that she did not like Student B, her statement to a student that he was going to be jailed if he did not change his behavior, and her statement to Ms. Garchow in the presence of students that she hoped Student B had left the school building without authorization so that the police could "deal with him." (Tr, Vol I, pp 193-196, 212, 220; Vol II, pp 365-371). (PDO, pp 38-40).

In addition to repeating arguments made in support of other exceptions, which we have rejected, appellant argues generally that her conduct did not violate the code of ethics and board policies "because the cited provisions she is alleged to have violated are overbroad and vague so as to make their meaning unclear." (Appellant's brief in support of exceptions, p 22).

In *Hall v Detroit Board of Education* (97-12), lv den unpublished order of the Court of Appeals, issued May 31, 2000 (Docket No. 223959), this Commission considered whether a teacher had violated a work rule that prohibited fraternizing

with students. In that case, we rejected as wholly unpersuasive the teacher's argument that the work rule was so vague that a reasonable person could not know that the charged conduct was improper, and we held that whether conduct violated the work rule was a question of fact to be determined on a case-by-case basis. We also agreed with the ALJ that the teacher in that case had adequate notice that the charged conduct was objectionable. See also *Harding v Board of Education of the Bedford Public Schools* (82-47) (flexibility of a policy does not render it invalid for vagueness).

In our judgment, any reasonable person would understand that appellant's conduct, as reasonably found by the ALJ, failed to satisfy the requirements of the cited policies and the code of ethics. We therefore reject appellant's vagueness challenge and we deny her fourth exception.

In her first exception, appellant asserts that the ALJ did not adequately consider the testimony of Ms. Provoast and Janet Klida[12] "regarding the true nature of the [classroom for students with emotional impairments] and the realities of working within it." (Appellant's brief in support of exceptions, p 13). According to appellant, it is impossible to make an informed decision about appellant's treatment of Student A and Student B without taking these witnesses' testimony into account.

Appellant cites Ms. Provoast's testimony that training scenarios when educators practice restraining individuals who are not "fighting back" are often different from real-life situations involving students who "try to do everything

[12] Ms. Klida retired in 2016 after working for many years as an educational assistant in appellant's classroom. (Tr, Vol III, pp 119-120).

possible" to avoid being restrained. According to Ms. Provoast, a real-life restraint therefore "rarely ends up looking like it should." (Tr, Vol IV, pp 30-31). She continued:

> Honestly, it's so hard to even picture unless you see some of the things that happen in the classroom, because you always, in the back of your mind have, you know, this CPI appropriate taught restraints are your goal always, but if you have a student being violent and aggressive, like what I always think is I want my hands off that student, right? So very often it ends up being the quickest way possible to get them inside the recovery room so that you can get your hands off of them And it's—it's nothing like the training, what really happens in the classroom. (Tr, Vol IV, p 34).

However, as noted by the ALJ (PDO, p 12), Ms. Provoast also testified that the conduct alleged in the charges was inappropriate. See Tr, Vol IV, pp 28-32.

We are not persuaded by appellant's suggestion that the PDO fails to recognize the realities of classrooms for students with emotional impairments. Ms. Provoast's testimony does not address many of the salient facts set forth in the charges and proved by a preponderance of the evidence, including but not limited to appellant's placement of Student A in seclusion on December 10 by pushing him with her foot, her repeated rejections of Mr. Van Tifflin's offers of assistance during the December 12 altercation, her repeated pushing of Student B's head into the floor, and her obscene statement to Student B preceding her dragging him to a seclusion room. In addition, some of the charged conduct did not concern seclusion and restraint but rather appellant's general treatment of Student B and her harmful statements to and about him. In our view, appellee was not arbitrary or capricious in determining that the challenges posed in classrooms for students with emotional

impairments did not justify or excuse the conduct toward Student A and Student B that led to the filing of the charges and the decision to discharge appellant.

Appellant's further argument in support of this exception is that the ALJ erred in failing to consider the testimony of Ms. Provoast and Ms. Klida that they sometimes told misbehaving students that they did not like their behavior. (Tr, Vol III, p 130; Vol IV, pp 28-29). Appellant argues that, based on this testimony, "It is therefore more likely that this is what [appellant] said to Student B, rather than that she did not like him [as alleged in the third charge]." (Appellant's brief in support of exceptions, p 14).

Neither Ms. Provoast nor Ms. Klida was at Linsday Elementary School in the fall semester of the 2018-2019 school year. Their testimony about how they expressed displeasure with students' misbehavior is therefore of little, if any, weight. On the contrary, Ms. Garchow, whose testimony the ALJ reasonably found to be credible, testified without equivocation that appellant stated in front of students that she did not like Student B. (Tr, Vol II, pp 365-366). We find no error in the fact that the ALJ did not cite Ms. Provoast's or Ms. Klida's testimony regarding this incident about which they had no knowledge. The ALJ is not required to address the testimony of every witness, and the fact that the ALJ credits some testimony does not mean that he did not consider the entire record. *Green v Reeths-Puffer Public Schools* (16-3), lv den unpublished order of the Court of Appeals, issued May 18, 2018 (Docket No. 340889), lv den, 503 Mich 998 (2019); *Purcell v Dearborn Public Schools* (11-52); *Benton v Flint Community Schools Board*

of Education (08-53), lv den unpublished order of the Court of Appeals, issued March 17, 2010 (Docket No. 295001); *Williams v Detroit Public Schools* (02-18).[13]

For these reasons, we deny appellant's first exception.

In her fifth exception, appellant challenges the ALJ's finding that appellee proved the sixth charge in part. As noted above, the sixth charge alleged that appellant was insubordinate and untruthful in several respects during a January 17, 2019 investigatory interview. At the outset of the interview, Ms. Grigg directed appellant to answer all questions truthfully. (Tr, Vol II, p 520). The ALJ found that appellee proved five of the seven alleged instances of untruthful statements: 1) her statement that, during the December 12 incident, she asked other staff members to help her; 2) her statement that, during the December 12 incident, Student B pulled her shirt down, exposing her breasts; 3) her statement that she did not antagonize Student B on December 12; 4) her statement that she dragged Student B to the seclusion room on December 12 by his armpits; and 5) her statement that her December 12 conduct was appropriate and in compliance with CPI and seclusion and restraint requirements.

Insubordination is the willful refusal to comply with a clear, reasonable, and fairly applied administrative directive or policy by someone who knows about the directive or policy and fully understands it. *Green*, *supra*; *Harris*, *supra*. Appellant does not argue that a knowing failure to comply with the clear directive she

[13] Regarding appellant's suggestion that the ALJ did not consider the testimony of Ms. Provoast, we note that he cited her testimony in support of his determination that appellee did not prove the fourth charge. (PDO, pp 19, 41).

received at the outset of the January 17 interview cannot support a charge of insubordination. Instead, she asserts that her January 17 statements were truthful.

Regarding her statement that she asked for help during her altercation with Student B, appellant argues that, "[I]t is possible that during the altercation some of the witnesses simply did not hear [her] ask for help." (Appellant's brief in support of exceptions, p 23). As noted above, however, we find that the ALJ reasonably determined that the testimony of Ms. Garchow and Mr. Van Tifflin that the latter repeatedly offered assistance that appellant expressly rejected was credible. As noted above, appelant's suggestion that appellee disprove another "possible" scenario is unavailing.

Appellant also challenges the ALJ's finding that she was untruthful when she stated on January 27 that she moved Student B to a seclusion room on December 12 by placing her hands under his arms. After noting the testimony of Mr. Phelps that Student B pointed to his wrists when Mr. Phelps asked him where appellant grabbed him to pull him into the seclusion room (Tr, Vol I, p 303), appellant states that, "Children are susceptible to suggestion." (Appellant's brief in support of exceptions, p 25). However, the ALJ relied on the credible testimony of Ms. Garchow and Mr. Van Tifflin regarding how appellant dragged Student B to the seclusion room.

Regarding the issue of whether appellant was truthful in reporting that her breasts were exposed during her altercation with Student B, we note the testimony of Mr. Van Tifflin and Mr. McCann that they did not see appellant's breasts exposed during that altercation and the testimony of Mr. Phelps and Linsday school social worker Jacob Garcia that appellant did not report exposure of her breasts when she

met with them immediately after her encounter with Student B. (Tr, Vol I, pp 230, 247-248, 299; Vol III, p 50). The photograph of appellant taken by Mr. Phelps shortly after that encounter also fails to support her claim that Student B stretched her shirt, exposing her breasts. (Tr, Vol I, pp 297-298; Exhibit 1).

For these reasons, we find no error in the ALJ's determination that appellant was not truthful on January 17 when describing these three aspects of the December 12 altercation. However, we find that the other statements alleged to be untrue (whether appellant antagonized Student B and whether her actions were appropriate) are more reasonably considered matters of opinion that, in our view, cannot support a charge of insubordination in this case. We therefore deny appellant's fifth exception in part and grant it in part.

In her sixth exception, appellant argues that the ALJ erred in declining to consider the factors set forth in *Szopo v Richmond Community Schoo*ls (93-60) in determining whether the decision to discharge her was based on a reason that was not arbitrary or capricious. (PDO, p 57). We disagree. Having found that the decision was the result of deliberate, principled reasoning based on evidence, the ALJ did not err in failing to address each of the *Szopo* factors. *ReVoir v Ann Arbor Public Schools* (18-5), lv den unpublished order of the Court of Appeals, issued November 5, 2019 (Docket No. 349534); *Lefebvre v Norway-Vulcan Area Schools* (18-1); *Mertz v Byron Center Public Schools Board of Education* (17-9), lv den unpublished order of the Court of Appeals, issued December 20, 2018 (Docket No.

344146), lv den ___ Mich ____ (2019); *Green*, *supra*. We therefore deny appellant's sixth exception.[14]

In its sole exception, appellee challenges the determination of the ALJ that appellee did not prove the fifth charge, which alleged that appellant failed to implement the IEPs and BIPs of Student A and Student B and that she therefore engaged in misconduct, was insubordinate, and was dishonest. In support of its exception, appellee does not identify on which of these grounds the ALJ erred.

Appellant admitted her responsibility for implementation of her students' IEPs and BIPs as written. (Tr, Vol I, pp 27-28; Vol IV, pp 143-144, 151-152). See 34 CFR 300.17(d)(2019); Mich Admin Code, R 340.1722; *Mertz*, *supra*. At the time in question, Student A's IEP required and included a behavior plan. (Tr, Vol I, p 180; Exhibit C). The interventions identified in the plan included placement of Student A's desk by the teacher's desk and allowing him to earn opportunities to assist school staff with jobs (e.g., filling ice bags, washing tables, picking up trash, and helping the custodian). In the event of Student A's continued inappropriate behavior (including blurting out, being defiant, leaving the classroom without permission, refusing to work or to take a break, hitting, or kicking), a staff member was to walk him to the school office. If Student A's behavior endangered himself or someone else, the classroom was to be cleared and the principal was to be notified. (Exhibit D). Appellant admitted that she did not implement those components of Student A's behavior plan. (Tr, Vol I, pp 58-60).

[14] We nonetheless note that the decision to discharge appellant was clearly not arbitrary or capricious based on consideration of at least one *Szopo* factor, to-wit, the extent to which appellant's conduct deviated from the norms of appropriate conduct for members of society and teaching professionals.

In *Mertz*, *supra*, the several charges upon which the teacher's discharge was based included a charge that he engaged in misconduct and was derelict in his duties related to his students' IEPs. In that case, there was ample evidence of the teacher's failure to fulfill his specific obligations under his students' IEPs to provide progress notes and documentation of their progress in meeting the social-emotional/behavioral and reading goals set forth in their IEPs and his failure to use a required assessment tool to document their progress in meeting measurable reading goals.

In the instant case, appellant challenges the reasonableness of Student A's behavior plan, arguing that it was ineffective and in need of updating. (Tr, Vol IV, pp 65-67). Although it is not for this Commission to rule on the reasonableness of such a plan, we find little, if any, evidence in the instant record of specific instances when appellant was required to, and did not, implement the cited aspects of Student A's IEP or BIP. In addition, we note that, according to appellant, Student A's desk was placed near the desk of an educational assistant. (Tr, Vol I, p 59). Appellee did not prove by a preponderance of the evidence that that placement was materially at odds with the IEP's statement about the location of Student A's desk.

As required by Student B's IEP (Exhibit C), there was also a behavior plan in place for him at the time in question. (Exhibit D). Appellee points to the plan's reference to the use of "break cards." Appellant admitted that she did not use "break cards" with Student B. (Tr, Vol I, p 60). However, the IEP and BIP did not clearly require the use of such cards and the record is devoid of an explanation of what they were or when appellant was required to use them with Student B. We

therefore find that appellee failed to offer sufficient evidence to allow reasonable review of this charge as it related to Student B.

For these reasons, we find that appellee did not prove the fifth charge by a preponderance of the evidence and we deny appellee's exception.

ORDER

For the foregoing reasons, we order the following:

Appellant's first, second, third, fourth, and sixth exceptions are denied.

Appellant's fifth exception is granted in part and denied in part.

Appellee's exception is denied.

Appellant is hereby discharged.

_____
David Campbell, Chairperson

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Nicole McKinney, Member

_____
Michelle Richard, Member

_____
Jeffrey Sewick, Member

_____
William Wooster, Member

Dated: November 27, 2019