PATRICIA SULLIVAN,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
MONTGOMERYCOUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee.	Opinion No. 14-51

OPINION

INTRODUCTION

Patricia Sullivan (Appellant) appeals the decision of the Montgomery County Board of Education (local board) terminating her from her teaching position on the grounds of insubordination, willful neglect of duty, and misconduct in office.

We referred this case to the Office of Administrative Hearings (OAH) as required by COMAR 13A.01.05.07A(2). The Administrative Law Judge (ALJ) issued a proposed decision recommending that the State Board uphold the local board's termination decision. Appellant filed exceptions to the ALJ's Proposed Decision and the local board responded. We heard oral argument from the parties on August 24, 2014.

FACTUAL BACKGROUND[1]

Appellant has a bachelor's degree in early childhood education and a master's degree in special education from Johns Hopkins University. Prior to teaching in Maryland, Appellant was an early intervention teacher in West Virginia for six years. She began her career in Maryland as a part-time early intervention teacher in Washington County, where she worked while she earned her master's degree. (T. 321-322).

Appellant taught at three different schools in the Montgomery County Public School system (MCPS) during the period she was employed by the local board. Appellant began teaching in the autism program at Cloverly Elementary School in Montgomery County in August 1997. She taught there until 2006 when she transferred to Baker Middle School, where she was a school/community-based teacher working with children with special needs. She was transferred to Rockville High School in October 2011, where she worked as a Learning for Independence (LFI) instructor, teaching life skills to prepare children with complex learning and cognitive needs for adulthood. (T. 322-23).

[1] We have reviewed the Appellant's claims that the ALJ made several factual errors. None of the errors cited by the Appellant are material to the conclusions reached by the ALJ. We shall correct identified errors as part of our own factual background, but otherwise adopt the factual findings of the administrative law judge.

The local board ultimately terminated Appellant from her employment. Her termination was based on three incidents that occurred between May 2011 and May 2012 at Baker Middle School and Rockville High School involving three separate students. (Appeal, Ex. A).

May 11, 2011 Incident – Food Aversion Therapy

The first incident took place at Baker Middle School and involved an autistic student named DB who had a tendency to spit on objects, surfaces, and people. (T. 326-327). On May 11, 2011, students in DB's classroom participated in a "learning-to-work" exercise in which they assisted in cooking a dish, each adding a necessary ingredient to the batter in a bowl. (T. 51-52). When the bowl reached DB, he spit into it. (T. 52-53). The ALJ found that Appellant "took the bowl and threw the contents of the bowl onto [the student's] face and on his shirt" before verbally reprimanding him. (Proposed Decision at 7; T. 51-52). The Appellant acknowledged "putting" food on DB's face, but denied "throwing" food at him and stated that it was part of a behavioral technique called aversion therapy, which seeks to stop disruptive behavior by creating a negative association with that behavior.[2] (T. 329-30).

The Appellant emailed DB's mother after the incident and stated that she hoped to try aversion therapy with DB. Her email did not state that she had already used that technique with the student. DB's mother responded by email on or about May 17, 2011, stating that she did not give permission for aversion therapy to be used with her son. She described the technique as "degrading and disrespectful" and likened it to treating her son like a disobedient dog. (Supt. Ex. 4, pgs. 20-25).

On May 19, 2011, the Appellant was placed on administrative leave with pay while an investigation was conducted "into allegations of inappropriate, unprofessional behavior." (Supt. Ex. 4, p. 9). She received a formal reprimand by letter on August 19, 2011. The letter stated that food aversion therapy was not an approved behavior management technique and described her behavior as unprofessional. The letter included the following language:

> This letter of reprimand should act as a warning to you that you need to alter your behavior management techniques with students. I must also warn you that any future instances of such behavior will be grounds for more severe disciplinary action, up to and including dismissal.

(Supt. Ex. 4, p. 3).

Throughout her appeal of her termination, Appellant has stated that she does not contest the reprimand she received in connection with the incident.

September 2, 2011 Incident – Wrestling Mat

Prior to the start of the 2011- 2012 school year, Appellant met with Louise Worthington,

[2] The record indicates that Appellant also used the food aversion therapy on DB after he spit into a jar of peanut butter on May 16, 2011. (T. 394; Hearing Exhibits, Attachment 5). The ALJ did not include this incident as part of his findings of fact because Appellant's reprimand was limited to the events of May 11, 2011.

the principal at Baker. They discussed a protocol that Appellant could use in order to receive immediate assistance in her classroom. She was to use her walkie talkie and state "Miss Lupia to SCB," which would alert the assistant principal, Ms. Lupia, and others that she required aid. This protocol was not in place with any other teacher at Baker. (T. 90-92).

On September 2, 2011, Appellant began having problems with a student named DS. DS was watching a video on a computer during his free time and became upset when Appellant attempted to divert him to a learning activity in which the students were to make s'mores. DS knocked the computer mouse off of the table and swiped at a computer monitor. Appellant pulled DS's chair back and attempted to verbally calm him down. DS began to hit and kick Appellant and attempted to hit another student in the class. A paraeducator in the classroom assisted Appellant with attempting to stop DS from hitting or kicking. (T. 332-336).

After DS ripped an earring out of Appellant's ear and continued to attempt to hit and kick, Appellant instructed the paraeducator to grab a wrestling mat that was on the floor and stand it on its side to use as a barrier between DS and the other students. Appellant described her actions as "surrounding" DS with the mat. (T. 337-339). When standing on its end, the mat was at least five feet tall. (Proposed Decision at 9, n. 7). After the student was contained, Appellant instructed the paraeducator to use the emergency code to summon assistance. (T. 340).

Principal Worthington heard the code and called for several others to join her in the classroom. She observed the student encircled within the wrestling mat which was held closed.[3] She stated that Appellant and the paraeducator were standing over the mat, looking down inside at the student. (T. 94-95). DS was "kicking and screaming and trying to get out of the makeshift enclosure." (Proposed Decision at 9). Principal Worthington ordered Appellant to release DS from the enclosure. (T. 95). Appellant did so, but DS was agitated and continued to kick and scream. (T. 343). Hearing his mother's voice on a cell phone helped briefly calm DS down, but he did not calm down fully until another educator held him from behind and sat him down in a chair. (T. 98-100; 344-46). Principal Worthington stated that she believed other measures could have been used prior to containing DS in the mat. (T. 110).

On October 21, 2011, Appellant received a reprimand for using the wrestling mat as an improper restraint. The letter stated that neither old nor new MCPS procedures allowed the mat to be used to physically restrain a student. The letter also warned Appellant that future behavior could lead to more severe disciplinary action, including her termination. (Supt. Ex. 4, pg. 34).

May 16, 2012 Incident – Hallway Incident

After the second reprimand, Appellant was soon transferred to Rockville High School, where she taught in the Learning for Independence program. (T. 351-52). Part of the curriculum included taking students on field trips into the community in order to teach various life skills, such as making purchases at stores. (T. 134-35).

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[3] She described it as being fastened by a Velcro strap. (T. 95). Other testimony in the record indicated that the Velcro was broken and that the mat was being held together by Appellant. (T. 338-39, Supt. Ex. 4, pg. 48). Appellant claimed that Principal Worthington previously approved using the wrestling mat in this manner, an accusation that the principal denied. (T. 110, 342-43).

On May 16, 2012, Appellant planned a field trip into the community with her students. One of the students was "T," who reportedly suffered from Fragile X syndrome and was diagnosed with autism. T had trouble in his class prior to the trip and was not prepared to leave with the other students. Appellant encouraged T to go to his locker to retrieve his coat, but he did not follow her instructions. Appellant finally offered T the choice of staying behind in class or going along on the trip; T decided to stay behind and Appellant walked with him to another classroom. T would not enter the classroom and the teacher instructed Appellant that she could leave T in the hallway because he would eventually come inside. (T. 144-45, 354-56).

The teacher asked T whether he wanted to come inside her classroom or go on the class trip. After T indicated he wanted to go on the trip, she told him to run to the bus. (T. 144-45). By this time Appellant had arrived back at the bus and was surprised to see T appear. Although T stood in the doorway of the bus, he would not board. Appellant was unsuccessful in trying to have T either board the bus or return to his classroom. Appellant then got off of the bus and placed her hand on T's backpack in order to take him back to his classroom. A substitute paraeducator accompanied T and Appellant back to the classroom. (T. 359-361). In the words of the substitute paraeducator, Appellant was "pushing him along" the hallway towards the classroom, but not in a "malicious or forceful" manner. (Supt. Ex. 4, pg. 73-74). Once they arrived back at the classroom, T refused to enter and Appellant continued to push him while T leaned back against her. (Supt. Ex. 4, pg. 74-75; T. 365-66).

A special education teacher, Sandra Boyke, was speaking to another employee at the far end of the hallway when the incident occurred. She testified that "I saw [Appellant] and T. They seemed to be struggling. I yelled 'Stop,' and ran to assist them." (T. 228). After she approached Appellant, she described seeing that "T had his legs spread and he was holding onto the wall like he did not want to move. [The Appellant] had one leg in between T and was pushing him." (T. 229). Ms. Boyke told Appellant to stop and Appellant stepped away from T. (T. 148-49, 229, 367). T's parents had previously informed the school that T was not to be touched, but Appellant stated she was never told these instructions. (T. 234; 383). In addition, MCPS teachers were instructed not to touch students unless the teacher or student was in danger. (Supt. Ex. 4, pg. 67; T. 281).

On May 21, 2012, Principal Debra Munk issued a reprimand to Appellant for "inappropriately touching a student and failing to exercise . . . professional judgment." (Supt. Ex. 4, pg. 65). She testified that she had lost trust in Appellant's judgment and no longer wanted her working with LFI students at her school. (T. 307). On June 5, 2012, the Appellant filed a grievance of the reprimand which was denied in each of three levels of review. (Appellant Ex. 3). She was placed on paid administrative leave on June 10, 2012. (T. 387).

By letter dated September 12, 2012, Appellant was terminated. The letter stated she was being dismissed for insubordination, willful neglect of duty, and misconduct in office based on the three incidents that took place over the course of the previous year involving "inappropriate physical interactions" with special needs students. (Supt. Ex. 2).

Appellant appealed to the local board, which sent the case to a hearing examiner. A hearing took place on January 17 and 18, 2013. The hearing examiner issued a decision on May

28, 2013 recommending that the local board uphold the Superintendent's termination decision. (Hearing Examiner's Recommendation). The local board heard oral argument on the termination on July 15, 2013. On September 23, 2013, the local board voted to affirm the hearing officer's recommendation and terminate the Appellant. (Appeal, Ex. A).

This appeal to the State Board followed. The case was referred to the Office of Administrative Hearings for a contested case hearing, which took place on February 20, 2014, and concluded via phone on February 24, 2014. The administrative law judge issued an opinion on May 27, 2014 recommending that the State Board uphold the Appellant's termination. (Proposed Decision). The Appellant filed exceptions to which the local board responded.

We heard oral argument from the parties on those exceptions during our August 26, 2014 meeting.

STANDARD OF REVIEW

The standard of review the State Board applies to the termination of a certificated employee pursuant to § 6-202 of the Education Article is that the State Board exercises its independent judgment on the record before it in determining whether to sustain the termination. COMAR 13A.01.05.05F.

The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications or amendments to the proposed decision. *See* Md. Code Ann., State Gov't §10-216(b).

LEGAL ANALYSIS

Appellant raises eight exceptions to the ALJ's proposed decision. These are: (1) additional evidence offered by Appellant at the hearing was improperly excluded; (2) the ALJ did not read the record evidence; (3) the ALJ improperly stated that Appellant did not contest the local board's version of the facts in each of the three incidents at issue; (4) the ALJ improperly construed MCPS policies; (5) the ALJ failed to address a question raised by Appellant about whether her second reprimand constituted disparate discipline; (6) the ALJ failed to address the question of whether a teacher is entitled to rely on the written policies of her employer; (7) the ALJ improperly rejected her claim of retaliation; and (8) the ALJ improperly rejected her argument that MCPS's actions in connection with the second incident constituted a breach of the duty of good faith and fair dealing. We shall address each of these exceptions in turn.

Admission of Additional Evidence

Appellant argues that the ALJ improperly excluded ten exhibits that she sought to introduce. She contends that the ALJ wrongly determined that the State Board's regulations prohibited the ALJ from considering evidence that was not presented to the local board. She maintains that this violates the State Board's duty to review a termination appeal *de novo*. The

local board disagrees, arguing that the State Board's policies and regulations generally do not allow for new evidence to be presented on an appeal of a local board's decision and that the ALJ had the authority not to consider the additional evidence.

The State Board regulations governing certificated employee terminations provide the following concerning additional testimony:

> C. Additional Testimony.
>
> (1) Additional testimony or documentary evidence may be introduced by either party but evidence that is unduly repetitious of that already contained in the record may be excluded by an administrative law judge.
>
> (2) Notwithstanding §C(1) of this regulation, the administrative law judge may permit repetitious testimony if credibility is an issue.

COMAR 13A.01.05.07C.[4]

In addition, the general procedures governing all State Board appeals state that "[i]f an appellant asks to present additional evidence on the issues in an appeal," it must be "shown to the satisfaction of the State Board that the additional evidence is material and that there were good reasons for the failure to offer the evidence in the proceedings before the local board." COMAR 13A.01.05.04C. Contrary to Appellant's argument, these general procedures apply to all appeals, including those involving certificated employee terminations. Appellant stated that the evidence she intended to offer was material because it provided additional background on the allegations against her and support for her claim of retaliation. She claimed that the evidence was not presented to the local board because her previous counsel chose not to offer it. Appellant argues that her counsel, a union representative, had a conflict of interest in her case because he was more concerned with representing the union as a whole and not her specifically. (Sullivan Pre-Hearing Conference Statement).

We conclude that *choosing* not to present evidence to the board, for whatever reason, is not a "good reason." The exclusion of this evidence did not mean the Appellant was deprived of a *de novo* review. Although we review the record in a termination proceeding *de novo*, that does not mean that an entirely new record must be created before the ALJ. Rather, it means that we give no deference to the factual or legal conclusions reached by the local board.

Reviewing the Record Evidence

Appellant argues that the ALJ's decision is "rife with errors of the sort that would not be made by someone who had actually read the record." She concludes from this that the ALJ did not review the record and suggests that he relied too heavily on the local board's decision below. The local board maintains that none of the errors referenced by the Appellant are material to the

[4] In addition to repetitious testimony, the Office of Administrative Hearings also allows an ALJ to exclude evidence that is incompetent, irrelevant, or immaterial. Md. Code, State Government Article ' 10-213(d).

ALJ's decision.[5]

Appellant lists the following errors: (1) The ALJ stated that "Miss Lupia was not identified to be any particular person," when she was actually an assistant principal; (2) Appellant taught at Cloverly Elementary School, not Overlea Elementary School; and (3) A student named DB was referred to as DR. In addition, Appellant suggests that there were other, unstated factual errors and states that "material factual errors" will be discussed as part of her third exception (*see* "Disputing the Local Board's Facts").

We have reviewed the record in this case and agree with Appellant that the ALJ erred in the three specified instances. Miss Lupia was identified as an assistant principal at Baker in the record, Appellant taught at Cloverly, and the student should have been referred to as DB. None of these errors is material and none suggest that the ALJ did not actually read the record, which included more than 400 pages of transcript testimony.

Disputing the Local Board's Facts

Appellant takes issue with the ALJ's statement that "Appellant has never disputed that the acts of each incident occurred" and that the incidents "were not refuted." Appellant maintains that she "disputes in the strongest possible terms that the acts of each incident occurred as described by [the ALJ.]" The local board argues that the ALJ properly drew conclusions from the evidence and that Appellant is merely upset that those conclusions did not square with her own view of the events at issue.

Appellant appears to misunderstand the ALJ's comment that Appellant "never disputed the acts of each incident." We understand the ALJ's comment to mean that Appellant did not dispute that these three incidents occurred, even as she disputed the details of what took place and the recollections of other witnesses. For instance, Appellant denies she threw any food at student DB, but she does not deny that she used food aversion therapy.

In addition, Appellant faults the ALJ for not including all of the details that preceded the incident with the wrestling mat and disputes his characterization of some of the facts. The ALJ was allowed to draw conclusions based on the conflicting evidence in the record; summarizing that evidence briefly does not mean that the ALJ failed to consider all of the testimony offered by Appellant.

Finally, Appellant states that the ALJ "decided several critical issues of fact" against Appellant concerning the hallway incident, credited the testimony of "proven liars," and reached improper conclusions from viewing a videotape of the third incident. In particular, Appellant "takes exception in the strongest possible terms" to the ALJ's finding that two school employees, Ms. Boyke and Ms. King, moved in the direction of Appellant and T "as if they needed to intervene" during the hallway incident. Appellant argues that it cannot be determined what was in the minds of the employees and describes them as "strolling casually" down the hallway.

[5] One complaint Appellant raises is that the ALJ erred in numbering the exhibits. Appellant herself acknowledges that this error was harmless and we agree.

The ALJ's role was to decide critical issues of fact. In reviewing the video, it is clear that the employees cut short a conversation and immediately began walking in the direction of Appellant and T once they appeared at the far end of the hallway. The ALJ's resulting conclusion, that the employees appeared to see the need to intervene, was a reasonable inference that was entirely consistent with the video of the hallway incident. In reaching his conclusions, the ALJ sorted through conflicting testimony and at times credited the testimony of other employees instead of the testimony offered by Appellant. Although Appellant is unhappy with the conclusions reached by the ALJ, that does not mean that the ALJ failed to take into account her version of events or improperly viewed the facts as being entirely uncontested.

The Interpretation of MCPS Policies/Relying on Written Policies of Employer

The ALJ defined misconduct in office as a "transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior . . ." ALJ Proposed Decision at 21 (quoting Black's Law Dictionary (Sixth Ed.)). Appellant argues that she did not commit misconduct because she did not violate any "established and definite" procedures or policies. She challenges the local board's interpretation of its policies in connection with two of the incidents and maintains that she was allowed to rely on the policies as written. The local board's policies track the definitions used in the Code of Maryland Regulations.

1) The Use of "Exclusion" or the Use of a "Mechanical Restraint"

Appellant maintains that when she removed DS to an area away from other students and "surrounded DS with a large soft mat" that this action constituted a permissible act of "exclusion." COMAR defines "exclusion" as "the removal of a student to a supervised area for a limited period of time during which the student has an opportunity to regain self-control and is not receiving instruction including special education, related services, or support." COMAR 13A.08.04.02.B(4); *see also* MCPS Regulation JGA-RA.III.E (containing a similar definition). A setting used for exclusion must "be unlocked and free of barriers to prevent egress." COMAR 13A.08.04.04B(3).

We are unpersuaded by Appellant's attempt to describe her behavior as practicing "exclusion." Nothing in the definition of "exclusion" suggests that a student is to be "removed" from his classmates by enclosure in a mat. The regulation specifically requires that the area of exclusion "be unlocked and free of barriers to prevent egress." COMAR 13A.08.04.04B(3). Given that DS was surrounded by the mat and unable to move outside of it, we conclude that it was a barrier preventing egress and therefore not a permissible use of exclusion.

Appellant also challenges the local board's argument that the use of the wrestling mat violated the local board's policies against using a "mechanical restraint." A mechanical restraint is "any device or material attached or adjacent to the student's body that restricts freedom of movement or normal access to any portion of the student's body and that the student cannot easily remove." COMAR 13A.08.04.02.B(8); *see also* MCPS Regulation JGA-RA.III.H(1)

(containing a similar definition).[6]

Appellant argues that the mat was not a mechanical restraint because it was not "attached or adjacent" to the student's body as handcuffs or a straitjacket would be, but was "at some distance away" from the student's body. She contends that the mat did not "restrict freedom of movement or normal access to any portion of the student's body" because the student was "completely enclosed" but not "restrained" by the mat. She points to the fact that the student was able to still hit the inside of the mat as evidence that the student was able to move. Appellant acknowledges that the student could not move beyond the enclosure, but challenges the assertion that the student could not "easily remove" the mat, stating that the mat was not fastened together because the Velcro that would normally hold the mat together was broken. She states that she used the mat only after other alternatives failed to calm the student.

The ALJ concluded that the use of the wrestling mat which "stood on end" and was "secured by Velcro to form a tube, with the student inside," was a mechanical restraint. We agree. The mat, while not tight against the student's skin, was closely adjacent to his body and restricted his freedom of movement. The ALJ stated that the student "could not move beyond the enclosure and/or remove it from around his person. He was completely enclosed and restrained." In our view, the ability of the student to still strike against the mat does not mean he had the unrestricted "freedom of movement" or the normal access to his own body envisioned by the regulation. While the record contained conflicting testimony about whether the mat was "secured by Velcro" or whether the Velcro did not work and the mat was secured by Appellant holding it together, the student could not have easily removed the mat.

2) Permissible or Impermissible Touching

The Appellant argues that her actions in moving the student from the school bus to a classroom were permissible. In MCPS, there is a general policy against touching students. (Supt. Ex. 4, pg. 67; T. 184, 281). In addition, state and MCPS regulations presume that teachers will not use physical restraint against students, except in limited circumstances. *See* COMAR 13A.08.04.05A(1)(a); *see* MCPS JGA-RA.IV.K (same). "Physical restraint" is defined as "the use of physical force, without the use of any device or material, that restricts the free movement of all or a portion of a student's body." COMAR 13A.08.04.02B(11); *see also* MCPS Regulation JGA-RA.III.H.2 (containing a similar definition). Only certain types of touching or force, in particular situations, are permissible. Specifically, teachers may hold students to briefly calm or comfort them; hold students by the hand or arm to escort them safely; move disruptive students who are unwilling to leave an area; and intervene in a fight in accordance with state law. COMAR 13A.08.04.02B(11)(b). Therefore, Appellant's conduct was acceptable only if it

[6] A mechanical restraint is different from a "protective or stabilizing device," which is similarly defined, but is used "for the purpose of enhancing functional skills, preventing self-injurious behavior, or ensuring safe positioning of a person." COMAR 13A.08.04.02.B(13). In order for school personnel to use a "protective or stabilizing device," it must be prescribed by a health professional or be a part of a student's individualized education program (IEP) or behavior intervention plan. COMAR 13A.08.04.05A(2). There was no evidence in the record to suggest that those conditions had been met.

constituted a permissible form of touching.[7]

The ALJ reviewed security footage of the third incident, which is divided into three segments, and found the following facts:

> The Appellant had two hands on T's back and her gait demonstrated a pushing action upon T as she leaned forward into T. She was clearly directing T's movements down the hallway against his will. Once she turned a corner moving toward T's classroom, she controlled his movement with her left hand on his back, open palm down, while she and T walked at a steady gait. (T #1.avi)
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> The video does confirm that neither [Ms.] Boyke nor [Ms.] King[8] ran up the hallway toward Appellant and T. They clearly walked at a normal pace. However, the video does make clear that something caught their attention, as they were too far away to have been concerned about an event so far from them, unless they heard sounds, words or other noise and or visual stimuli that caused them to be concerned and walk down the hallway toward the Appellant and T. (T #3.avi)
>
> There is vague movement at the end of the hallway, as if there was a scuffle between the Appellant and T. That cannot be determined with certainty from the video; but, what can be determined with certainty is that [Ms.] Boyke and [Ms.] King moved in their direction as if they needed to intervene.

The ALJ found the testimony of Ms. Boyke to be "credible" and her testimony informed his conclusions. After Ms. Boyke walked down to the end of the hall, she stated that the Appellant was standing behind T: "T had his legs spread and he was holding onto the wall like he did not want to move. [The Appellant] had one leg in between T and was pushing him." Ms. Boyke stated that "I told her to stop. She said he did not want to go or something to that effect, and I said, 'Just back off. I'll take care of it. I'll take care of him.'"

The ALJ also credited the testimony of the substitute paraeducator who was with the Appellant. The paraeducator stated that the Appellant "was behind T coming from the bus towards the school in a sense looking as if she was moving him along, like pushing forward, but not in a malicious way." He later added that "it would have seemed like she was pushing because she was behind him and making him walk down the hallway." The paraeducator stated that T "got very red" and was "pretty upset" outside the classroom door as if "he just didn't want to be pushed anymore."

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[7] Appellant asserts that the "no touching" policy was unwritten and not properly conveyed to teachers. In our view, the written regulations are clear about what forms of student touching are permissible and MCPS's general "no touching" directive is consistent with those regulations.

[8] Ms. King worked in school security. (T. 227-228). Ms. Boyke, a special education teacher, and Ms. King can be seen speaking in the video before the incident. Ms. King did not testify at the hearing.

We conclude that Appellant's behavior was not consistent with permissible forms of touching, such as holding a student's hand "to escort the student safely" or moving a disruptive student who is unwilling to leave an area. Videos of the hallway incident demonstrate that Appellant pushed T in the back rather than held his hand or arm to escort him. But even if pushing T in the back through the halls was permitted as a means of escort, pushing T at the threshold of his classroom was not part of a "safe" escort. Similarly, pushing T to apparently encourage him to enter the classroom went beyond merely moving a disruptive student. Accordingly, her actions constituted physical restraint and were not permitted by regulations.

Appellant quotes MCPS policy regarding physical restraint for the proposition that "the intended use of the restraint determines if its use is allowable." MCPS Regulation JGA-RA III.H. The ALJ acknowledged testimony in the record that the pushing was "not malicious," but he concluded that Appellant did not need to have an intent to harm the student to be responsible for an impermissible touching. We agree. In our view, the MCPS regulation means that we must look to Appellant's intent to determine if her conduct was a permissible form of touching. Although Appellant claims that her intent was to safely escort T, her actions in trying to push him into the classroom are not consistent with that claim.

In reaching our conclusion, we consider the hallway incident in light of Appellant's past conduct. She was twice put on notice that her "behavior management techniques" were inappropriate and that she needed to closely follow MCPS regulations. As MCPS regulations and COMAR make clear, the use of physical restraint is not allowed and teachers may touch students only in limited, permissible ways. Pushing T at the classroom door threshold was not one of those permitted forms of touching. It crossed the line of acceptability and showed poor judgment on the part of Appellant. Appellant had been warned about the consequences of violating MCPS regulations. This past history informed the school system's decision to terminate the Appellant and convinces us that the ALJ reached the correct conclusion about Appellant's actions.

"Disparate Discipline"

Appellant argues that the ALJ failed to consider her argument that disciplining her for her actions in connection with the wrestling mat incident – but not disciplining another employee who used a "basket hold" restraint against the student – constituted "disparate discipline." Appellant appears to argue that, because another employee used what Appellant characterizes as an improper restraint, the discipline against Appellant was unwarranted or the other employee should have also been punished. She cites no statutes, regulations, or cases supporting that conclusion.

Appellant was disciplined for using a mechanical restraint in violation of state regulations. She does not allege that the other employee used a mechanical restraint. Therefore, this is not a situation where two employees committed the same type of misconduct, but were treated differently. Moreover, whether or not another employee committed misconduct and was, or was not, disciplined does not diminish the Appellant's responsibility for her own actions.

Retaliation

Appellant takes exception to the ALJ's conclusion that there was "no credible evidence" tending to prove that Appellant was fired in retaliation for filing a grievance. Appellant argues that there was temporal proximity between the last incident on May 16, 2012, her filing of a grievance on June 5, 2012, and her placement on administrative leave on June 11, 2012. She contends that there was no intervening event justifying her removal and eventual termination other than her act of filing a grievance challenging her third reprimand. The parties agree that Appellant committed no additional misconduct after May 16, 2012. The local board argues, however, that even if placing Appellant on administrative leave constituted an adverse employment action, the temporal proximity alone does not demonstrate a causal connection between her grievance and the action.

In order to establish a *prima facie* claim of retaliation, Appellant must show that (1) she engaged in a protected activity; (2) that the school system took a materially adverse employment action against her; and (3) that a causal connection existed between the protected activity and the materially adverse action. *Burlington N. & Santa Fe Ry. Co. v. White*, 584 U.S. 53, 68 (2006). The school system may then rebut the *prima facie* case by showing that there was a legitimate non-discriminatory reason for the adverse action. *Id.* The burden then shifts back to the Appellant to show that the reasons given by the school system are pretextual. *Id.*

Even assuming that the Appellant has made out a prima facie case of retaliation, she cannot overcome the school system's showing of a legitimate non-discriminatory reason for placing her on administrative leave and eventually terminating her. *See Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493 (D.C. Cir. 2008) (stating that once an employer has asserted a legitimate, non-discriminatory reason for the adverse action, the question of whether an employee has made out a prima facie case is "no longer relevant"). Appellant had three reprimands within the course of a year, all relating to her use of various behavior modification methods with special needs students. In our view, those three events in their totality constituted a legitimate reason to place Appellant on administrative leave and terminate her. The school system's loss of trust in her judgment was not, in our view, a pretext to retaliate against her for filing a grievance and the Appellant offers no evidence to the contrary.

"Duty of good faith and fair dealing"

Appellant argues that it was a "breach of MCPS's duty of good faith and fair dealing to have placed a student such as DS in [Appellant's] class without appropriate behavioral supports as specified in his IEP, and then to discipline [Appellant] for her creative response to the impossible situation that her employer knowingly created." She adds that MCPS exacerbated the situation by canceling a class on behavioral management techniques the week before the incident, which Appellant would have otherwise attended. The local board responds by stating that Maryland law does not recognize a separate cause of action for a breach of the implied covenant of good faith and fair dealing and that Appellant would need to raise the issue as part of a breach of contract action against the school system.

We conclude that the ALJ did not commit error by declining to credit Appellant's

argument. Maryland does not recognize a breach of the duty of good faith and fair dealing as a separate cause of action. *See Cutler v. Wal-Mart Stores, Inc.*, 175 Md. App. 177, 195 (2007) (citing *Mount Vernon v. Branch*, 170 Md. App. 457, 471-72 (2006)). Even assuming Appellant could raise this argument as a legitimate defense to her actions, we do not find it to be meritorious. Appellant contends that had MCPS offered her more classroom support, she would not have violated its policies. The ALJ was free to consider this argument in mitigation, but he was not required to accept Appellant's defense as completely excusing her actions.

Summary

Reviewing the evidence as a whole, we adopt the proposed decision of the ALJ. Other than the factual errors referenced by Appellant, which we have corrected in this opinion, we find no merit to her exceptions. In reaching our conclusion, we acknowledge that Appellant's job was not an easy one. Teaching children with special needs presents many challenges and places a great deal of responsibility on the shoulders of teachers. Each one of these incidents, standing alone, might not support a decision to terminate. The three incidents within the span of a year taken together, however, demonstrate a pattern on Appellant's part of failing to modify her behavior based on warnings from her employer. Despite being cautioned about her unorthodox approaches, Appellant continued to use her own poor judgment in deciding how best to address the behavior of her students. The ALJ found that the local board had legitimately lost trust in the Appellant as an employee and that the local board's conclusion was justified. We agree.

CONCLUSION

For all these reasons, we adopt the recommendation of the ALJ, subject to the corrected factual errors referenced in our opinion, and affirm the decision of the local board.

Charlene M. Dukes
President

Mary Kay Finan
Vice President

James H. DeGraffenreidt, Jr.

Linda Eberhart

S. James Gates, Jr.

Larry Giammo

Luisa Montero-Diaz

Sayed M. Naved

Madhu Sidhu

Donna Hill Staton

Guffrie M. Smith, Jr.

September 23, 2014

PATRICIA SULLIVAN	*	JOHN T. HENDERSON, JR.,
v.	*	ADMINISTRATIVE LAW JUDGE
MONTGOMERY COUNTY	*	THE MARYLAND OFFICE
BOARD OF EDUCATION	*	OF ADMINISTRATIVE HEARINGS
	*	OAH No: MSDE-BE-01-13-42732

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On September 12, 2012, Joshua P. Starr, Ed. D, Superintendent (Superintendent) of the Montgomery County Public Schools (MCPS), notified Patricia Sullivan (Appellant), a teacher assigned to the Rockville High School (School), that he was recommending to the Board of Education of MCPS (BEMCPS or Local Board) [1] that she be terminated on the grounds of insubordination, willful neglect of duty and misconduct in office, effective September 12, 2012, pursuant to Section 6-202(a) of the Education Article of the Maryland Annotated Code.[2]

On January 17 and 18, 2013, Gregory A. Szoka, Esquire, a hearing examiner (hearing examiner), conducted a hearing on behalf of the Local Board. During the hearing, the Appellant was present and represented by counsel. The Local Board was also represented by counsel. The

[1] Code of Maryland Regulations (COMAR) 13A.01.05.01B(6) defines "local board" as the board of education for a county, including the Baltimore City Board of School Commissioners.
[2] In January 2012, Section 6-202 was located in the 2012 Supplement to the Education Article. Section 6-202 is now in the 2013 Supplement. All future references to the Annotated Code of Maryland, Education Article shall be referred to as "Education Article" and to the version found in the 2008 Replacement Volume or the 2013 Supplement.

hearing resulted in a transcript that numbered over 450 pages, numerous exhibits and post hearing written argument. On May 28, 2013, the hearing examiner issued a written decision recommending that the Local Board affirm the Superintendent's decision to terminate the Appellant. On July 15, 2013, the Local Board heard oral argument from counsel for the Superintendent and counsel for the Appellant. On September 23, 2013, the Local Board reviewed the recommendation of the Hearing Examiner, considered the oral arguments and voted to affirm the Hearing Examiner's recommendation to uphold the Superintendent's decision to terminate the Appellant.

On October 31, 2013, the Appellant filed an appeal to the Maryland State Department of Education (MSDE or State Board)[3] challenging the Local Board's decision to uphold her termination. On November 12, 2013, the State Board forwarded the Appellant's appeal to the Office of Administrative Hearings (OAH) for a contested case hearing. On December 2, 2013, the Local Board filed a Response to the appeal.

On December 17, 2013, I conducted a telephone prehearing conference, during which the respective parties identified the issues to be litigated, as well as relevant exhibits and witnesses to be presented during the contested case hearing. On February 20, 2014, I conducted a contested case hearing at the OAH office in Wheaton, Maryland. COMAR 13A.01.05.07. The Appellant was present and was represented by Karen S. Smith, Esquire. Judith S. Bresler, Esquire, represented the Local Board.[4] The hearing concluded via a telephone hearing on February 24, 2014, for the purpose of hearing the closing argument of the Local Board. Both counsel were present and participated.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the State Board of Education, and the Rules

[3] COMAR 13A.01.05.01B(10) defines "State Board" as the State Board of Education.
[4] At this hearing, I heard the Local Board's Motion in Limine, filed on February 4, 2014. I ruled on the motion at the hearing on February 20, 2014. COMAR 28.02.01.12B(5). I denied the admission of the Appellant's exhibits numbered one through ten. I admitted exhibits 11 and 12 into evidence.

of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); COMAR 13A.01.05; COMAR 28.02.01.

ISSUES

1. Did the record before the Board support the decision to terminate the Appellant for misconduct in office, insubordination and willful neglect of duty?

2. Was the Appellant terminated in retaliation for having filed a grievance for having been wrongly reprimanded in May 2012?

3. Was the Appellant terminated in retaliation for having reported to MSDE that the MCPS training of teachers with regard to restraints and seclusion was not in compliance with State and federal law?

4. Should the termination of September 23, 2013 be affirmed?

SUMMARY OF THE EVIDENCE

Exhibits

The entire record of the Local Board hearing held on January 17 and 18, 2013, to include a copy of the exhibits accepted into evidence as well as a transcript of that hearing, were incorporated into the record for the hearing that I conducted. COMAR 13A.01.05.07B. The following is a list of exhibits accepted at the hearing of February 20, 2014:

BOE Ex. 1	Correspondence regarding local hearing
BOE Ex. 2	Local hearing officer's Report dated May 28, 2013 (Findings of Fact, Conclusions of Law and Recommendation, Exhibits, Transcript, Written closing arguments
BOE Ex. 3	Correspondence regarding Oral Argument and Local County Board's Decision. A security camera compact disc (CD)

Local Board Hearing Record Exhibits:

A:	Decision and Order of the MCPS BOE, matter no. 2012-29 ("BOE Decision")B1: Memorandum from M. Alban re: Patricia Sullivan, August 2, 2011 ("Alban Memo #1")
B2:	Photograph of the gym mat in the SCB classroom
B3:	Rebuttal of the Appellant
B4:	Email from D. Johnson to L. Worthington, May 18, 2011

B5: Statement of Louise Worthington, May 17, 2011
B6: Statement of Katherine Browning, May 17, 2011
B7: Blank
B8: Email from L. Worthington to D. Williams, September 2, 2011
B9: Statement of Robin Lupia, September 2, 2011
B10: Statement of Kristie Welch, September 2, 2011
B11: Statement of the Appellant, September 2, 2011
B12: Letter of Reprimand from Bowers, August 19, 2011
B13: Letter of Reprimand from Bowers, October 21, 2011
B14: Letter of Reprimand from Munk, May 21, 2012
B15: Statement of Sandra Boyke (undated)

C: Hearing Officer Transcript (hearing transcript), Parts I & II

D: CD of Rockville High School security tapes, May 16, 2012

E1: MCPS Regulation JGA-RA (revised September 10, 2014)
E2: MCPS Regulation JGA-RA (revised March 13, 2012)
E3: MCPS website policy and regulation update page for 2011-2012
E4: Excerpts from agreement between MCEA & MCPS BOE, 2011-2014 ("MCEA Contract"), Art. 6.C.

The following are additional Local Board exhibits accepted at the hearing of February 20, 2014:

F1: Final Evaluation Report of the Appellant, May 5, 2011
F2: Behavioral and Educational Support Team (BEST) Consult Note ("BEST Consult Note), October 4, 2010
F3: Family Service Intended Action Letters for student DB, August 1, 2011 & November 3, 2011
F4: Family Service intended Action Letters for student DS, October 3, 2011
F5: Letter from D. Cox re: Completion of MCPS investigation into September 2, 2011 incident
F6: Email from D. Cox re: request for MCPS investigatory reports
F7: Emails to/from Worthington/Lupia/Gerson/the Appellant, August 25, 2011
F8: Email from L. Worthington cancelling training, August 24, 2011
F9: Emails to/from the Appellant and L. Worthington re: re-entry, August 9, 2011
F10: Emails to/f/rom the Appellant and L. Worthington re: attendance of Ms. Wilhelm's child, August 27, 2011/August 28, 2011
F11: MSDE memorandum to J. Weast, June 6, 2011
F12: Letter from Frappolli, May 29, 2012

I admitted at the hearing the following exhibits offered by the Appellant:

App. Ex. No. 11 Internet definition of mechanical restraint

App. Ex. No. 12- Dangerous Use of Seclusion and Restraints in Schools Remains Widespread and Difficult to Remedy: A Review of Ten Cases; United States Senate, Health, Education, Labor and Pensions Committee, Majority Committee Staff Report dated February 12, 2014

Testimony

The Local Board did not present any testimony. It relied on the testimony provided during the Local Board hearing held on January 17 and 18, 2013.

The Appellant relied on the testimony provided during the Local Board hearing of January 17-18, 2013, and offered at this hearing the testimony of Judy Burd, who was a parent of a child the Appellant taught at Baker Middle School.[5]

FINDINGS OF FACT

After considering the evidence presented, I find the following facts by a preponderance of the evidence:

Background

1. The Appellant holds a Bachelor's Degree in early childhood education and a Master's Degree in special education from Johns Hopkins University. She began her teaching career as an early intervention teacher in Berkley County, West Virginia, where she worked for six years. She then transferred to work part-time in Washington County, Maryland, as an early intervention teacher for three years while she obtained her Master's Degree. She applied for a position with MCPS and was hired in 1997 to work at Overlea Elementary School in its autism program. She transferred to Baker Middle School (Baker) in 2006 and worked there for five years. At Baker, she was a school/community-based teacher before being assigned to Rockville High School (Rockville High) for one year on October 24, 2011. While at Rockville High, she was employed as a Learning for Independence (LFI) instructor. Her work at Baker and Rockville High involved working with children with special needs.

[5] Burd did not provide any relevant testimony concerning the three employment incidents.

2. The position at Rockville High involved skill-based training for students in preparation for adulthood, while the middle school program was a less intense skill-based training program. While at Rockville High, she took a training course, but did not take any refresher courses on non-violent crisis intervention. The courses were offered once a month. The Appellant did not attend any.

3. The Appellant was disciplined for three separate incidents involving special needs students of Baker and Rockville High.

4. The first two incidents resulted in formal reprimands by Larry A. Bowers (Bowers), Chief Operating Officer for the Local Board. Bowers warned the Appellant that future instances of similar behavior would be grounds for more severe disciplinary action, including dismissal.

5. On September 5, 2012, Beth Schiavino-Narvaez, Ed.D. (Dr. Schiavino-Narvaez), who is the Deputy Superintendent of Schools of the Local Board, held a meeting between the Appellant and her union representative, Jerome Fountain.

6. Dr. Schiavino-Narvaez concluded that the method the Appellant used with each student- involved incident was inappropriate, not consistent with approved practices and protocols and in direct contravention of the warnings to alter her behavior management techniques with students.

7. The Local Board placed the Appellant on administrative leave without salary, effective September 12, 2012, pending its final action.

Incident No. 1; May 11, 2011; Food Aversion

8. DeAnna Johnson (Johnson) is a special education para-educator with the Local Board assisting with the school/community-based programs. During the 2010-2011 school year, she was a substitute special education para-educator. She would assist students in a variety of activities, including feeding, academic activities and generally assisting with children. Baker was

one of the schools in which she was a substitute during that school year. In May 2011, she was assigned for a week to the Appellant's class that had approximately six students. There were also two other para-educators in the school and community-based programs. Johnson was present in the Appellant's class on May 11, 2011.

9. On May 11, 2011, students were seated at a table in a learning- to- work class. A bowl passed from student to student, and food ingredients were added. When the bowl passed to a student named DR, he proceeded to spit into the bowl. DR was autistic and also prone to spitting. The Appellant took the bowl and threw the contents of the bowl onto DR's face and on his shirt. The Appellant then verbally reprimanded DR.

10. DR did not show much in the way of a reaction to the incident, but the incident was disruptive to the other students. Within a week following the incident, Johnson contacted Louise Worthington (Worthington), the principal of Baker, to file a report concerning the Appellant's behavior. Johnson also reported the matter to the Area Superintendent and Montgomery County Child Protective Services.

11. The Appellant emailed DR's mother on the afternoon of May 11, 2011, and reported that she sought parental permission to use a behavioral technique she called food aversion therapy. She did not inform the parent that she already subjected DR to the technique on that day. DR's mother responded to the email on or about May 17, 2011. She did not give permission under any circumstance for the Appellant to use the technique of food aversion therapy. DR's mother was horrified by the Appellant's food aversion therapy idea. She stated that she would "associate [food aversion therapy] as rubbing [her] dog's nose in his crap when he has an accident on the floor. She found the technique "degrading and disrespectful." (P. 24, Appellant's Dismissal Hearing Exhibits.)

12. The Appellant conceded that food aversion therapy is not an accepted behavioral practice or technique used by the Local Board. She also acknowledged that she did not have DR's parents' permission to engage in the technique before she subjected DR to it on May 11, 2011.

13. On May 18, 2011, Worthington placed the Appellant on administrative leave with pay for one day, based on allegations of physical abuse for the incident of May 11, 2011.

14. On August 19, 2011, the Appellant was formally reprimanded by letter from Bowers, who strongly reprimanded the Appellant for the May 11, 2011 incident. He determined that the Appellant's response to DR's behavior was physical and unprofessional. According to Bowers, the Appellant's reaction made a difficult situation worse. He dismissed her response that she was using food aversion therapy by reiterating that the Local Board does not subscribe to it as a behavior management procedure. Bower's letter of reprimand ended with an admonition as follows:

> This letter of reprimand should act as a warning to you that you need to alter your behavior management techniques with students. I must also warn you that any future instances of such behavior will be grounds for more severe disciplinary action, up to and including dismissal.

15. The Appellant is not contesting the reprimand for the May 11, 2011 food aversion incident.

Incident No. 2; September 2, 2011; Wrestling Mat

16. The Appellant returned to Baker for the 2011-2012 school year.

17. Worthington met with the Appellant prior to the start of the 2011-2012 school year to develop a plan that was intended to ensure the students were safe and the Appellant had the support from the school she needed.

18. The plan required that the Appellant would not use food aversion therapy or any kind of aggression with students. A protocol was put into place. If the Appellant felt she had

reached her "tipping point" in terms of emotional control, then she would use a radio to summon assistance with the use of a series of code words. The code words were "Miss Lupia to SCB."[6] This procedure was implemented because Worthington believed the Appellant would become frustrated with students and use a strategy to control student behaviors not in conformance with the Local Board's rules and regulations. This procedure was unique among faculty members at Baker.

19. On September 2, 2011, the Appellant dispatched the emergency code via walkie talkie. Worthington left her office to proceed to the Appellant's classroom while calling for the health tech and security assistant to report to the Appellant's class room. When she entered the class room, Worthington immediately noticed that student DS, who was a new sixth grader at Baker, who was slightly built and non-communicative, was encircled in a thick wrestling mat[7] held closed by a Velcro strap. DS was kicking and screaming and trying to get out of the makeshift enclosure. The Appellant and a para-educator were looking over the mat tube at the child. Worthington ordered the appellant to release DS, which she did.

20. DS was very agitated when released from the mat enclosure. He continued to kick and scream and push things off desks.

21. The Appellant telephoned DS's mother, who spoke with him and calmed him. The situation began to de-escalate after DS spoke with his mother.

22. Once DS calmed, Worthington asked what had precipitated the discipline and the use of the mat. Worthington learned that DS was watching Elmo, the Sesame Street character, on a computer. When it was time to have cookies, DS objected and began to hit other students and the Appellant. The mat was already present in the classroom for various activity reasons. The Appellant decided to use the mat to encircle DS in efforts to prevent him from hurting himself or others.

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[6] Miss Lupia was not identified to be any particular person.
[7] When standing on its end, the wrestling mat appeared from the photograph, to be at least five feet tall.

23. Worthington conceded that it would be safer if DS punched the mat that encircled him rather than a person, but she believed other measures could have been adopted prior to the use of the mat as a vertical restraint.

24. On October 21, 2011, Bowers sent a letter to the Appellant in which he issued her a reprimand for failing to follow protocol in that she used the wrestling mat as an improper restraint. Bowers noted that neither the old nor the new restraint procedures advocate use of physical material to restrain a student. The letter ended with a warning that similar behavior in the future will be grounds for more severe disciplinary action, up to and including dismissal.

Incident No. 3; May 16, 2012, pushing student T

25. On October 26, 2011, the Appellant was transferred to Rockville High and was assigned to teach LFI skills. The goal for the students in the LFI Program is to obtain functional life skills. The LFI students are taken into the community as part of their instructional curriculum to learn how to make purchases, manage checking and savings accounts and acquire related life skills.

26. A community trip was planned for May 16, 2012. The destination was a grocery store or some similar outing. A student named T was originally assigned to attend the trip. The Appellant was advised by a para-educator that T was having trouble in the prior class, which was physical education, and was not getting prepared for the trip. The Appellant tried to coax him to go to his locker and get his coat, but T did not focus on her request. The remainder of the class and para-educators left the classroom and boarded the bus while the Appellant remained behind with T. The Appellant gave T a choice to go to the bus or stay with Dutton, his teacher, for that period. T elected to stay with Dutton, whereupon the Appellant proceeded to take T to Dutton's class. T would not enter the class room. Dutton advised the Appellant to leave T in the hall, as he would enter the classroom at his election. The Appellant departed for the bus.

27. T did not go into Dutton's classroom, but instead walked to the bus waiting to depart to take students on the community trip. T stood in the doorway of the bus, but would not board. The Appellant could not convince T to board the bus or let go of the doors and return to his classroom.

28. The Appellant debarked from the bus and escorted T back to Dutton's classroom by placing her hand upon the backpack he was wearing, and pushed and guided him in the direction of the classroom. T was not cooperating. Saul Martinez, Jr. (Martinez), who was a substitute para-educator for LFI at Rockville High, accompanied the Appellant and T.

29. Once they arrived at the classroom, T refused to enter. The Appellant pushed T in an effort to get him to enter the classroom. T and the appellant struggled at the classroom door until teacher Boyke told the Appellant to stop pushing T, which she did.

30. On May 21, 2012, Debra Munk, (Munk) the Principal of Rockville High, issued a reprimand to the Appellant. Munk determined the Appellant had not comprehended the gravity of the situation in physically escorting T against his will from the bus area back to Dutton's classroom and accepted no responsibility for her conduct. Munk reprimanded the Appellant for not avoiding physically restraining or pushing T under those circumstances.

31. Munk lacked trust in the Appellant's judgment and did not want her at Rockville High working with LFI students.

32. On June 5, 2012, the Appellant filed a grievance, which was denied, at all levels. On June 10, 2012, the Appellant was placed on administrative leave.

33. By letter dated September 12, 2012, Starr wrote a letter advising the Appellant that he was recommending to the BOE that the Appellant be dismissed for insubordination, willful neglect of duty and misconduct in office effective that date.

The Appellant's rebuttal

34. On August 17, 2011, the Appellant wrote a rebuttal statement to the allegations made against her, summarized as follows:

> Incident No. 1; May 11, 2011; Food Aversion
>
> I have acknowledged that I utilized an aversive therapy approach in an attempt to develop a behavior plan that would effectively deter spitting. On separate instances, a small amount of peanut butter and cake batter were used to carry out the aversive therapy. This was done after multiple other strategies were tested and failed to produce the desired outcome. I only used the items that were spat in and do not recall powdered sugar being one of them.
>
> * * *
>
> While I understand that I exerted behavior strategies that were not documented and should have sought permission from the parents before beginning a more intrusive behavior strategy, my intentions were to protect and develop the child. Working with students who have Autism does not lend itself well to a "cookie cutter" approach. While traditional behavior strategies may work, well trained professionals will agree that uniquely designed strategies based on personal knowledge of a child are quite often needed. I would like to convey that I will act more cautiously when problem solving on behavioral strategies and I will not work independently when extremely difficult behaviors arise. I will ensure that any behavior strategies used in the classroom are well documented and shared/agreed upon as a part of the IEP process. I understand that I am employed by MCPS and I will take all measures to protect the school system and its reputation.
>
> Incident No. 2; September 2, 2011; Wrestling Mat; Not subject to this written rebuttal.
>
> Incident No. 3; May 16, 2012; Not subject to this written rebuttal, however, the Appellant wrote an email dated May 16, 2012 to the Assistant Principal of Rockville High, Daniel E. Garcia, summarized as follows:
>
> * * *
>
> We were very behind schedule at this point and I gave [T] two choices – Get on the bus or go back to Mrs Dutton's room. I told him to do one or the other by the time I counted to five. I slowly counted and [T] continued to say "I wanna earn." At this time, we needed to proceed with our scheduled trip and it was physically easier to escort [T] back in the building, rather than attempt to escort him up the stairs of the bus, which was not even an option in my eyes. This would have been a short distance, but not physically possible or safe situation. Mr. Martinez and I had to leave the staff members and eight students on the bus, while we walked [T] all the way back down to Mrs. Dutton's room.

[T] continued to be unagreeable, but allowed me to be playful and physically assist him to walk into the building and down the hall. Mr. Martinez witnessed this and can tell you that it was not aggressive in nature. This is very normal behavior for [T] and developing a playful repoire (sp) is often one of the only ways to get him to move from point A to point B in such situations.

I had to keep in mind that the other students and staff members were waiting in a non-air-conditioned bus during mid-70 degree temperatures outside. When we returned to the bus, it was indeed warm and I apologized to Ms. Grubic for having to make her wait in the heat.

[T] was upright and weight bearing as he walked and continued to move down the hallway of the school and only leaned his weight back on me when I instructed him to go into Ms. Dutton's classroom. Ms. Dutton and Ms. Boyke were walking from Ms. Boyke's classroom and advised me to just leave [T] outside the door again.

This is what I had originally done, however, [T] left and ran outside. I wanted to know that [T] was supervised but when Ms. Dutton and Ms. Boyke said they would monitor [T], Mr. Martinez and I left to return to the group who had waited at least 10 minutes to leave on their community instruction.

DISCUSSION

The Applicable Law

Section 6-202 of the Education Article provides the framework under which a teacher may be suspended or dismissed. Section 6-202(a) states:

(a) Grounds or procedures for suspension or dismissal.

(1) On the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant for:

(i) Immorality;
(ii) Misconduct in office, including knowingly failing to report suspected child abuse in violation of § 5-704 of the Family Law Article;
(iii) Insubordination;
(iv) Incompetency; or
(v) Willful neglect of duty.

(2) Before removing an individual, the county board shall send the individual a copy of the charges against him and give him an opportunity within 10 days to request a hearing.

(3) If the individual requests a hearing within the 10-day period:

(i) The county board promptly shall hold a hearing, but a hearing may not be set within 10 days after the county board sends the individual a notice of the hearing; and
(ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and to bring witnesses to the hearing.

(4) The individual may appeal from the decision of the county board to the State Board.

...

Maryland Educational Article §6-202(a)

In an appeal of a suspension or dismissal of a certificated employee pursuant to Section 6-202 of the Education Article, COMAR 13A.01.05.05F provides:

F. Certificated Employee Suspension or Dismissal pursuant to Education Article, §6-202, Annotated Code of Maryland.

(1) The standard of review for certificated employee suspension or dismissal actions shall be de novo as defined in F(2) of this regulation.

(2) The State Board shall exercise its independent judgment on the record before it in determining whether to sustain the suspension or dismissal of a certificated employee.

(3) The local board has the burden of proof by a preponderance of the evidence.

(4) The State Board, in its discretion, may modify a penalty.

COMAR 13A.01.05.05F

Accordingly, on behalf of the State Board and on the record before me, I am exercising my independent judgment and discretion to determine whether the Local Board has established by a preponderance of the evidence that the Appellant committed insubordination, willful neglect of duty and misconduct, and whether termination of her employment was an appropriate sanction.

The Local Board has a regulation entitled Classroom Management and Student Behavior Interventions, known as JGA-RA. The purpose of the regulation is to "set forth procedures concerning the continuum of behavior interventions designed to maintain a positive environment conducive to learning. *Id. p. 1.* Relevant definitions from the JGA-RA are as follows:

III Definitions

A. Behavior intervention plan is a proactive plan designed to address problem behaviors exhibited by a student in the educational setting through the use of positive behavioral interventions, strategies and supports.

* * *

C. Continuum of interventions is a progression of strategies utilized to guide student behavior.

* * *

E. Exclusion is the temporary removal of a student to a supervised area for a limited period of time during which the student has an opportunity to regain self-control and is not receiving instruction, including special education, related services, or support.

Relevant procedures from the JGA-RA are as follows:

IV Procedures

A. Staff will employ a full range of effective classroom management strategies designed to create a safe and orderly learning environment that supports academic achievement for all students.

B. When the student's inappropriate behavior requires the attention of the principal, counselor, school psychologist, pupil personnel worker, or other specialist, the classroom teacher will so inform the principal or designee who will arrange a conference as soon as possible. When feasible, this conference will include the principal or designee, the parents, the classroom teacher, the student, and others when appropriate, to discuss the problem and to explore possible steps to resolve it.

* * *

E. When a student's behavior seriously disrupts the instructional program to the detriment of other students, the classroom teacher may temporarily remove him/her from class and refer the student to the principal or designee for appropriate disciplinary action, which may include sanctions such as alternative structure, in-school suspension; or suspension. Prior to readmission, the principal or designee will be responsible for facilitating a resolution. If the principal, after consultation with the classroom teacher, determines that it is necessary, he/she will arrange, as soon as possible, a conference among himself/herself or designee, the teacher, and

needed appropriate specialists to discuss the problem and to explore steps to resolve it. If mutually satisfactory steps do not result from this conference, the principal may, after consultation with the classroom teacher, schedule another conference involving the parent(s), community or associate superintendent, and/or a member of student services. The principal will determine when the student will return to class, and he/she or designee will make such determination after consultation with the teacher. If the student has an Individualized Education Program (IEP), the process will follow federal and state laws governing special education.

F. School staff are expected to use a continuum of positive behavioral interventions, strategies, and supports to increase or decrease targeted student behavior.

* * *

M. School personnel may use exclusion to address a student's behavior if the student's behavior unreasonably interferes with the student's learning or the learning of others and/or constitutes an emergency and exclusion is necessary to protect a student or other person from imminent, serious, physical harm after other less intrusive, non-physical interventions have failed or been determined inappropriate.

COMAR 13A.08.04.02B provides the following definitions:

(4) "Exclusion" means the removal of a student to a supervised area for a limited period of time during which the student has an opportunity to regain self-control and is not receiving instruction including special education, related services, or support.

* * *

(8) Mechanical Restraint.

(a) Mechanical restraint means any device or material attached or adjacent to the student's body that restricts freedom of movement or normal access to any portion of the student's body and that the student cannot easily remove.
(b) Mechanical restraint" does not include a protective or stabilizing device.

* * *

(11) Physical Restraint.

(a) Physical restraint means the use of physical force, without the use of any device or material, that restricts the free movement of all or a portion of a student's body.
(b) Physical restraint does not include:
(i) Briefly holding a student to calm or comfort the student;
(ii) Holding a student's hand or arm to escort the student safely from one area to another;
(iii)Moving a disruptive student who is unwilling to leave the area if other methods such as counseling have been unsuccessful; or
(iii)Intervening in a fight in accordance with Education Article §7-307, Annotated Code of Maryland.

(12)"Positive behavior interventions, strategies, and supports" means the application of affirmative school-wide and individual student specific actions, instruction, and assistance to encourage educational success.

(13) Protective or Stabilizing Device.

(a) Protective or stabilizing device means any device or material attached or adjacent to the student's body that restricts freedom of movement or normal access to any portion of the student's body for the purpose of enhancing functional skills, preventing self-injurious behavior, or ensuring safe positioning of a person.

(b) Protective or stabilizing device" includes:
(i) Adaptive equipment prescribed by a health professional, if used for the purpose for which the device is intended by the manufacturer;
(ii) Seat belts; or
(iii)Other safety equipment to secure students during transportation in accordance with the public agency or nonpublic school transportation plan.

* * *

(15) Restraint means the use of a physical or mechanical restraint.

* * *

COMAR 13A.08.04.02B

Appellant's Argument

The Appellant contends that the Local Board failed to prove by a preponderance of the evidence that her dismissal for insubordination, willful neglect of duty and misconduct is justified.

In support of her argument, she cites Maryland Education Article 6-202. She argues she should not be terminated for the totality of the three reprimands. She seeks revocation of her termination, placement back into the classroom as a teacher and back pay. She further argues that the disqualification of the rationale for one of the reprimands against her would eviscerate the Local Board's position for termination.

The Appellant bases her argument on incident number three, May 16, 2012. According to the Appellant, she proved that her actions in escorting T were not violent and/or aggressive. She further argues that the Local Board's witnesses were not reliable. She states their testimony was discredited. According to the Appellant, the security video tape proves she was simply escorting T back to the classroom in a calm and peaceful manner. She maintains she never pushed or acted aggressively to T at any time. She argues that termination is not justified for the act of escorting a non-compliant student back to the classroom, especially since there was no malicious intent.

According to the Appellant, she should not be terminated because each of the violations that resulted in reprimands are not similar conduct. They are, according to her, not related and cannot be aggregated to summarize some totality of violations justifying termination. She argues that the Local Board is bound by the tenets of progressive discipline; i.e., there can be a penalty that is more than a reprimand but short of termination. She further argues that her termination is the result of retaliation because she filed a grievance after the third reprimand.

The Appellant also argues that she did not employ the use of a mechanical restraint by the use of the wrestling mat at Baker. According to her, temporarily encircling an out-of-control student behind a soft gym mat while leaving the student's arms, legs, head and body free to pound against a soft barrier does not compare to what is ordinarily meant by mechanical restraint. A

mechanical restraint would be, she argues, a straightjacket, shackles, and/or a Rifton chair.[8] In her mind, she temporarily excluded an out- of- control student from the rest of the classroom so that he could not hurt anyone or himself. She stresses she was following protocol established by Baker's principal.

The Appellant believes she received little direction by MCPS on changing her behavior management techniques and should have been allowed to rely on common sense interpretations of the regulation JGA-RA. Essentially, the Appellant believes her termination is not only unfair, but a violation of the Local Board's obligation of good faith and fair dealing under the employment contract, as well as being arbitrary and capricious.

Local Board's Argument

The Local Board argued that in three incidents within a twelve- month period, the Appellant reacted with anger and frustration, rather than patience and understanding, in her work with severely disabled children who often have difficult behavioral problems. The dismissal was justified, as explained by the Superintendent, as follows:

> Because there have been three incidents of inappropriate physical interactions in a 12-month period involving three special needs students, the third after two prior high level reprimands and warnings about additional occurrences, I do not have confidence in your judgment or ability to manage student behavior appropriately and therefore, cannot recommend your continued employment with Montgomery County Public Schools.

Letter dated September 12, 2012 from the Superintendent.

The Local Board agreed and determined that it did not have confidence in the Appellant's judgment or ability to manage student behavior appropriately.

According to the Local Board, the Appellant did not produce any evidence that she signed up for a behavior management training class that was cancelled; that she was prevented from taking

[8] A Rifton activity chair is a positioning chair that provides versatile and adaptive seating for people with disabilities ranging from pediatrics to adults. http://www.rifton.com/products/special-needs-chairs/rifton-activity-chairs.

a summer behavior management training class because she was placed on administrative leave on May 18, 2011; or that the advice to explore resources to help identify positive classroom management strategies contained in the August 19, 2011 reprimand, would have impacted the summer months. Moreover, according to the Local Department, there was no class offered over the summer. The Local Department found it unlikely that the Appellant would have attended a summer class when, according to it, she refused to attend a monthly training refresher course on nonviolent crisis intervention because it was after school hours.

The Local Department also found it curious that the Appellant would not meet with Luther Jett, who was a behavior intervention specialist, whose job was to provide the type of advice and training to teachers Bowers advised in his letters of reprimand. The Local Board maintains that dismissal of the Appellant from employment is appropriate because within a twelve- month period, there were three separate incidents where she utilized inappropriate physical interventions that exacerbated student behavior.

Analysis

Four issues have been presented for my resolution and decision, for which my answers are as follows:

1. The record before the Board did support the decision to terminate the Appellant for misconduct in office, insubordination and willful neglect of duty.

2. The Appellant was not terminated in retaliation for having filed a grievance for having been wrongly reprimanded in May 2012.

3. The Appellant was not terminated in retaliation for having reported to MSDE that the MCPS training of teachers with regard to restraints and seclusion was not in compliance with state and federal law.

4. The September 23, 2013 termination should be affirmed.

In conducting my de novo review of this matter, exercising my independent judgment, I have read the complete record below, viewed the security video tape, considered any additional exhibits presented at this appeal and considered the arguments of the parties.

The Local Board has provided sufficient definitions for misconduct in office, insubordination and willful neglect of duty. *Resetar v. State Board of Education,* 284 Md. 537, 562 (1979) has defined insubordination as a "conscious, willful and recalcitrant rejection of authority of a supervisory office." It has been further defined as a "refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a wilful or intentional disregard of the lawful and reasonable instructions of the employer." *Black's Law Dictionary, Sixth Edition.*

Willful neglect is defined as the "intentional disregard of a plain or manifest duty, in the performance of which the public or the person injured has an interest. Willful neglect suggests intentional, conscious, or known negligence; a knowing or intentional mistake." *Id.* The term misconduct means a "transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior. . . . *Id.* The Local Board has established by a preponderance of the evidence that the Appellant committed insubordination, willful neglect of duty and misconduct. As a result, termination of her employment was an appropriate sanction.

The Appellant's misconduct in office, insubordination and willful neglect of duty

Bowers sent the Appellant two letters of reprimand, which I did find important in making my decision. Contained within the first letter of reprimand concerning the food aversion therapy incident at Baker, Bowers warned the Appellant to alter her behavior management techniques with

students. He also warned that "any future instances of such behavior will be grounds for more severe disciplinary action, up to and including dismissal." [9]

Bowers' second letter of reprimand concerning the wrestling mat incident at Baker stated that the Appellant failed to follow protocol in that she used the wrestling mat as an improper restraint. He further warned her that similar behavior in the future will be grounds for more severe disciplinary action, up to and including dismissal. This second incident, within four months of the first incident, demonstrates that the Appellant failed to understand the first warning and admonition. The definition of mechanical restraint found within COMAR 13A.08.04.02 is clear. Any device or material attached or adjacent to the student's body that restricts freedom of movement or normal access to any portion of the student's body and that the student cannot easily remove, is a mechanical restraint. The wrestling mat, stood on end, and secured by Velcro to form a tube, with the student inside, was a mechanical restraint constructed by the Appellant. The mat in that form was adjacent to the student's body; it restricted his freedom of movement and he could not move beyond the enclosure and/or remove it from around his person. He was completely enclosed and restrained.

School personnel are encouraged to use an array of positive behavior interventions, strategies and supports to increase or decrease targeted student behaviors. COMAR 13A.08.04.03A and B. School personnel shall only use exclusion, restraint, or seclusion after less restrictive or alternative approaches have been considered, and attempted; or determined to be inappropriate. COMAR 13A.09.04.03B.If exclusion, restraint or seclusion is utilized, it should be done in a humane, safe, and effective manner without intent to harm or create undue discomfort, and consistent with known medical or psychological limitations and the student's behavioral

[9] The Appellant does not contest this letter of reprimand and concedes she acted inappropriately.

intervention plan. *Id.* Here, the Appellant did not consider any other method to gain control of the student but to encircle him within a mechanical restraint.

The third incident involving physically moving T from the school bus back to his classroom by pushing him against his will, again demonstrates the Appellant's transgression from the established rule or policy of the Local Board. Physically handling a student was a well known forbidden act at Rockville High. The Appellant's professional duty was to maintain her composure and not lay hands upon the student. It was a dereliction of her duty by acting against the rule and policy. Pushing T down the hallway toward his classroom and making a last effort to push him into the classroom, all during the scope of her employment, demonstrates her misconduct in office.

I reviewed the security video and saw the Appellant and T walking into the school from outside along with Martinez. The Appellant had two hands on T's back and her gait demonstrated a pushing action upon T as she leaned forward into T. She was clearly directing T's movements down the hallway against his will. Once she turned a corner moving toward T's classroom, she controlled his movement with her left hand on his back, open palm down, while she and T walked at a steady gait. (Video T #1.avi.)[10]

The video does confirm that neither Boyke nor King ran up the hallway toward the Appellant and T. They clearly walked at a normal pace. However, the video does make clear that something caught their attention, as they were too far away to have been concerned about an event so far from them, unless they heard sounds, words or other noise and or visual stimuli that caused them to be concerned and walk down the hallway toward the Appellant and T. (T #3.avi.)

There is vague movement at the end of the hallway, as if there was a scuffle between the Appellant and T. That cannot be determined with certainty from the video; but, what can be

[10] The quality of the video was not good. It was grainy at the point it depicted the Appellant and T outside of his classroom. I viewed the video several times, however, and have determined the facts as I state within this decision.

determined with certainty is that Boyke and King moved in their direction as if they needed to intervene.

The Appellant argues that the testimony of witnesses to the incident, and specifically, the testimony of Boyke is not credible. The relevant portion of Boyke's testimony is the following:

Answer: I saw T was holding onto a wall in front of Room 1017. [The Appellant] was standing behind him. She appeared to be pushing him and Mr. Martinez was standing alongside them.

Question: So when you saw this, what did you do?

Answer: I yelled immediately for [the Appellant] to stop pushing T. [The Appellant] did not stop, so I ran down the hall. I was in front of Room 1020, so there might have been about three classrooms separating us.

Question: And where was [the Appellant] when you arrived at that classroom?

Answer: When I arrived [the Appellant] was standing in the back of T. T had his legs spread and he was holding onto the wall like he did not want to move. [The Appellant] had one leg in between T and was pushing him.

Question: What happened next?

Answer: I told her to stop. She said he did not want to go or something to that effect, and I said "Just back off. I'll take care of it. I'll take care of him."

Question: And what happened? What did she do?

Answer: She stopped.

Transcript of January 17, 2013 hearing, p. 228, 11-22; p. 229, 1-12.

The testimony of Martinez did not refute the fact that the Appellant pushed T.

Question: Where is [the Appellant] and where is T? You're in front opening the door. Where are the two?

Answer: Well, I guess she was behind T coming from the bus towards the school in a sense looking as if she was moving him along, like pushing forward, but not in a malicious kind of way, like I said before. It was just kind of like, you know –

Question: But pushing him along?

Answer: Yeah, like, you know, come on, let's go.

Transcript, testimony of Saul Martinez, Jr., p. 177, 19-22; p. 178, 1-8

* * *

Answer: Yeah, slouches. She's behind him, and he's like (Indicating), like this, kind of like that. So it seemed like, you know – I mean, like I said, it didn't seem in a way she was doing it maliciously to push him, but, yeah, I guess it would have seemed like she was pushing, because she was behind him and making him walk down the hallway.

Transcript, testimony of Saul Martinez, Jr., p. 182, 1-8

Martinez did testify that the push was not malicious, as if the pushing act is an excusable act when it is done void of malicious intent. The word push is defined as follows:

> To use force to move (someone or something) forward or away from you.
> To go forward while using your hands, arms, etc., to forcefully move people or things that are blocking you.
> To force or try to force or persuade (someone) to do something.

http://www.merriam-webster.com/dictionary/push. The word malicious is defined as "having or showing a desire to cause harm to another person; having or showing malice." http://www.merriam-webster.com/dictionary/malicious.

Malicious does not appear within the definition of push. Nothing within the definition of push requires causation of harm to another. An intent to cause harm to another person is not necessary to show that someone was pushing another. A person might push another solely intending to move that person along. That is what the Appellant did to T. She pushed him, intending to move him along because T was not going to cooperate and move along willfully.

I found the testimony of Boyke to be credible and not refuted by Martinez or any other witness. Whether Boyke walked or ran down the hallway toward the commotion between the

Appellant and T has no bearing on the fact that the Appellant was pushing T. That fact remains unrefuted.

Regarding the Appellant's additional arguments that she was treated unfairly, and/or was not provided adequate training in behavioral management techniques and/or she was retaliated against, I find all to be red herrings to the relevant facts of the three incidents at issue in this matter. The Appellant has never disputed that the acts of each incident occurred. She offers excuses as to why they occurred. The excuses she offers does not prevent the Local Board from making a personnel decision of termination. The Appellant cites no rule of law that requires the Local Board to consider the excuses she raised throughout these proceedings and/or decide not to terminate her employment. Under each circumstance, the Appellant acted inappropriately and failed to follow the rules and policy of the Local Board. She was insubordinate in refusing to get necessary training in student behavioral management. She willfully neglected her duties as a Local Board teacher by inappropriately using physical touching of the students under her control, despite knowing that such touching was not the policy of the Local Board or of any of the schools at which she taught.

All three actions subject to these proceedings demonstrate a dereliction of duty, in that the Appellant intentionally failed to carry out the duties or meet the responsibilities of the position of teacher. Incidents numbered 1, 2 and 3 are all evidence of her dereliction. Each standing together, or standing alone, can result in the Appellant's termination from employment with the Local Board, pursuant to Education Article, section 6-202.

Was the Appellant terminated in retaliation for having filed a grievance for having been wrongly reprimanded in May 2012?

There was no credible evidence presented tending to prove that that the Local Board terminated the Appellant in retaliation of a filed grievance. The Appellant's grievance was properly filed and considered on every level. The Appellant was represented at each stage of the grievance.

There is no witness or document tending to prove that the Local Board terminated the Appellant solely to punish her for filing a grievance.

Was the Appellant terminated in retaliation for having reported to MSDE that the MCPS' training of teachers with regard to restraints and seclusion was not in compliance with state and federal law?

There was no credible evidence presented tending to prove that the Local Board terminated the Appellant because she reported to MSDE that MCPS' training was not in compliance with law. There is no witness or document tending to prove that the Local Board terminated her solely for that reason.

Should the termination of September 23, 2013 be affirmed?

I conclude that the termination of September 23, 2013 should be affirmed. The Appellant has approximately twenty-five years of experience teaching special education children. Her efforts through the years are not discounted by me. Her goal was to take advantage of a teachable moment and provide life skills to children who, but for teachers like her, would have a very difficult time being functional in society, if at all. However, the Appellant failed to maintain that level of discipline and professionalism that is required of her to be trusted to continue as a teacher/employee with the Local Board. I have considered the Appellant's prior teaching record against all three incidents that have affected her continuing fitness as a teacher. However, the fact remains that all three incidents did occur. They were not refuted. They were not excused by any rule, statute, policy or regulation. The Local Board has legitimately lost trust in the Appellant as an employee. I conclude that the appropriate sanction is termination and that the Local Board's decision to terminate the Appellant is not arbitrary or capricious.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Local Board established that the Appellant violated state law and the Local Board's policy by

committing the acts against students on May 11, 2011, September 2, 2011, and May 16, 2012. Education Article Section 7-306; COMAR 13A.08.01.11E; MCPS Classroom Management and Student Behavior Interventions, known as JGA-RA.

I further conclude as a matter of law that the Local Board established that the Appellant committed misconduct, insubordination and willful neglect of duty pursuant to the incidents of May 11, 2011, September 2, 2011 and May 16, 2012. Education Article, Section 6-202(a)(1)(ii)(iii) & (v).

Finally, I conclude as a matter of law that the Appellant's misconduct, insubordination and willful neglect of duty committed on May 11, 2011, September 2, 2011 and May 16, 2012, and each standing alone, negatively affects her fitness to teach and that termination of her employment with the Local Board is appropriate. Education Article, Section 6-202; *Resetar v. State Board of Education,* 284 Md. 537 (1979).

PROPOSED ORDER

I **PROPOSE** that the decision of the Local Board to terminate the Appellant for insubordination, willful neglect of duty and misconduct should be **AFFIRMED**.

May 27, 2014
Date Decision Mailed

John T. Henderson, Jr.
Administrative Law Judge

JTH/emh
#149591

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this Proposed Decision has the right to file written exceptions within fifteen days of receipt of the decision; parties may file written responses to the exceptions within fifteen days of receipt of the exceptions. Both the exceptions and the responses shall be filed with the Maryland State Department of Education, c/o Sheila Cox, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. COMAR 13A.01.05.07F. The Office of Administrative Hearings is not a party to any review process.

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PATRICIA SULLIVAN	*	JOHN T. HENDERSON, JR.,
v.	*	ADMINISTRATIVE LAW JUDGE
MONTGOMERY COUNTY	*	THE MARYLAND OFFICE
BOARD OF EDUCATION	*	OF ADMINISTRATIVE HEARINGS
	*	OAH No: MSDE-BE-01-13-42732

* * * * * * * * * * * * *

FILE EXHIBIT LIST

Exhibits

The entire record of the Local Board hearing held on January 17 and 18, 2013, to include a copy of the exhibits accepted into evidence as well as a transcript of that hearing, were incorporated into the record for the hearing that I conducted. COMAR 13A.01.05.07B. The following is a list of exhibits accepted at the hearing of February 20, 2014:

BOE Ex. 1	Correspondence regarding local hearing
BOE Ex. 2	Local hearing officer's Report dated May 28, 2013 (Findings of Fact, Conclusions of Law and Recommendation, Exhibits, Transcript, Written closing arguments
BOE Ex. 3	Correspondence regarding Oral Argument and Local County Board's Decision. A security camera compact disc (CD)

Local Board Hearing Record Exhibits:

A:	Decision and Order of the MCPS BOE, matter no. 2012-29 ("BOE Decision")B1: Memorandum from M. Alban re: Patricia Sullivan, August 2, 2011 ("Alban Memo #1")
B2:	Photograph of the gym mat in the SCB classroom
B3:	Rebuttal of the Appellant
B4:	Email from D. Johnson to L. Worthington, May 18, 2011
B5:	Statement of Louise Worthington, May 17, 2011
B6:	Statement of Katherine Browning, May 17, 2011
B7:	Blank
B8:	Email from L. Worthington to D. Williams, September 2, 2011
B9:	Statement of Robin Lupia, September 2, 2011
B10:	Statement of Kristie Welch, September 2, 2011
B11:	Statement of the Appellant, September 2, 2011
B12:	Letter of Reprimand from Bowers, August 19, 2011

B13: Letter of Reprimand from Bowers, October 21, 2011
B14: Letter of Reprimand from Munk, May 21, 2012
B15: Statement of Sandra Boyke (undated)

C: Hearing Officer Transcript (hearing transcript), Parts I & II

D: CD of Rockville High School security tapes, May 16, 2012

E1: MCPS Regulation JGA-RA (revised September 10, 2014)
E2: MCPS Regulation JGA-RA (revised March 13, 2012)
E3: MCPS website policy and regulation update page for 2011-2012
E4: Excerpts from agreement between MCEA & MCPS BOE, 2011-2014 ("MCEA Contract"), Art. 6.C.

The following are additional Local Board exhibits accepted at the hearing of February 20, 2014:

F1: Final Evaluation Report of the Appellant, May 5, 2011
F2: Behavioral and Educational Support Team (BEST) Consult Note ("BEST Consult Note), October 4, 2010
F3: Family Service Intended Action Letters for student DB, August 1, 2011 & November 3, 2011
F4: Family Service intended Action Letters for student DS, October 3, 2011
F5: Letter from D. Cox re: Completion of MCPS investigation into September 2, 2011 incident
F6: Email from D. Cox re: request for MCPS investigatory reports
F7: Emails to/from Worthington/Lupia/Gerson/the Appellant, August 25, 2011
F8: Email from L. Worthington cancelling training, August 24, 2011
F9: Emails to/from the Appellant and L. Worthington re: re-entry, August 9, 2011
F10: Emails to/f/rom the Appellant and L. Worthington re: attendance of Ms. Wilhelm's child, August 27, 2011/August 28, 2011
F11: MSDE memorandum to J. Weast, June 6, 2011
F12: Letter from Frappolli, May 29, 2012

I admitted at the hearing the following exhibits offered by the Appellant:

App. Ex. No. 11 Internet definition of mechanical restraint

App. Ex. No. 12- Dangerous Use of Seclusion and Restraints in Schools Remains Widespread and Difficult to Remedy: A Review of Ten Cases; United States Senate, Health, Education, Labor and Pensions Committee, Majority Committee Staff Report dated February 12, 2014