DEBORAH PRICE,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,	OF EDUCATION
Appellee.	Opinion No. 14-35

OPINION

INTRODUCTION

Deborah Price ("Appellant") was a teacher at William C. March Middle School. The Chief Executive Officer (CEO) of Baltimore City Public Schools, Andrés A. Alonso recommended her for dismissal for misconduct and willful neglect of duty. On February 22, 2013, a Hearing Examiner conducted an evidentiary hearing on behalf of the local board and recommended that the local board affirm the CEO's decision to terminate the Appellant. On April 9, 2013, the local board affirmed the Hearing Examiner's recommendation. Appellant appealed the local board's decision to the State Board. The case was transferred to the Office of Administrative Hearings for a *de novo* hearing which was held on September 12, 2013. The Administrative Law Judge (ALJ) issued a proposed decision on December 11, 2013, concluding that the local board established that the Appellant violated state law and the policy of the local board by using corporal punishment and thereby committing misconduct and willful neglect of duty for which termination was appropriate.

The Appellant filed exceptions to that decision. The local board responded. Oral Argument on the exceptions occurred at the April 22, 2014 Board meeting.

FACTUAL BACKGROUND

The Appellant, a teacher in Baltimore City Schools for 23 years, was terminated from her job. The events leading up to her termination occurred on November 17, 2010.

On that date, AR, a sixth grade student, came into Appellant's classroom for her Language Arts class. In the Appellant's classroom, AR had an assigned seat for the purpose of controlling AR's behavior. AR wanted to move to another seat, which the Appellant did not permit, but AR moved to the seat anyway. After the Appellant directed AR back to the assigned seat, AR moved to a different seating location. Again, the Appellant attempted to direct AR back to the assigned seat, but instead of returning to her seat, AR left the classroom. As AR left the classroom, the Appellant informed AR that she could not return to the classroom without a pass from the school administrator. (T.105)

After AR left the classroom, the Appellant continued with the lesson. Shortly afterward, AR returned to the classroom, and screamed "I am the teacher." At that time, the Appellant was in the back of the classroom and AR was in the front near an overhead projector. (T.106).

The Appellant began to move to the front of the room toward AR. (T.106). As the Appellant moved toward the front of the classroom, AR grabbed a magic marker from the Appellant's desk and began to write on a piece of paper placed on the overhead projector. (T.106-107). When the Appellant got to AR, the Appellant grabbed AR's arm and in the process both the Appellant and AR fell to the floor. (CEO Ex. #5 (Appellant's Statement to BCPS Investigator)). While on the floor, the Appellant continued to keep AR in a hold with her other arm and talked with AR about her behavior. (CEO Ex. #5 (Appellant's Statement to BCPS Investigator)). The Appellant lifted AR from the floor and began escorting her out of the classroom. (CEO Ex. #5 (Appellant's Statement to BCPS Investigator)). As the Appellant was pulling AR up from the floor to escort her out of the classroom, Assistant Principal Washington was at the classroom door. She directed the Appellant to step outside into the hallway. (T.108)

As a result of that event, the Chief Executive Officer recommended that the Appellant be terminated for using corporal punishment - - an act in violation of the school's discipline policy and considered misconduct and willful neglect of duty. A hearing on the charge was held and the hearing officer and the local board concluded that the Appellant's actions fit within the definition of corporal punishment and constituted misconduct in office and willful neglect of duty.

This appeal ensued. We referred the case to the Office of Administrative Hearings (OAH) for a *de novo* hearing. The parties did not present any additional testimony, relying instead on the testimony before the local board's hearing officer. (Proposed Decision at 4).

The Administrative Law Judge (ALJ) issued a Proposed Decision affirming the decision of the local board concluding that:

> The Appellant does not contest that she used corporal punishment by making physical contact with AR for the purpose of removing the student from the classroom. The evidence established that AR was not sitting in her assigned seat, did not comply with the Appellant's request to sit in the assigned seat, left the classroom and returned without a pass from an administrator, re-entered the classroom and began to cause a disruption to the entire classroom. The Appellant admitted that she grabbed the student and that after making physical contact with her, both the Appellant and the student fell to the floor. The Appellant also admitted that she pulled the student up from the floor to escort her out of the classroom. Without dispute, these facts establish that the Appellant used corporal punishment in violation of State law and BCPS policy. Education Article §7-306; COMAR 13A.08.01.11E; BCBSC, Policy and Regulations Manual, Section JKA-Student Discipline.

Proposed Decision at 13.

The ALJ considered whether the sanction of termination was appropriate. She explained:

> The issue presented is challenging. Prior to the incident, the Appellant had twenty-three years of teaching in the BCPS system, during which she received the highest level of annual evaluations, was involved in many activities in addition to her teaching duties, received awards for her teaching, and has been described as exemplary and a model teacher by her supervisors. Additionally, the Appellant has never been disciplined during her career with the BCPS system. For those reasons, when considering the ultimate sanction of termination, a thoughtful balancing of the Appellant's past performance against the impact of her misconduct on her ability to teach is critical.
>
> . . .
>
> The Appellant has presented some evidence that she was dealing with personal issues at the time of the incident that may have led to her losing her control of her reaction to AR. The Appellant also argued that it was momentary lapse in judgment. However, no matter how isolated this incident and what her personal issues may have been, I cannot overlook that the Appellant's students saw a teacher who is supposed to be a role model of behavior tackle another student "like a solider" or as if she were "in a football game." Perhaps, the Appellant's own statement in the October 2010 Performance Based Evaluation demonstrates how this incident negatively impacts her ability to teach in the future when she wrote "that she will model all expectations for her students because most are visual" (App. Ex. 7). After this incident, any prior behavior modeling by the Appellant has been cast aside for a new behavior model, witnessed by several students, that includes corporal punishment for inappropriate student behavior. As a result, I must conclude that the Appellant's misconduct on November 17, 2010 negatively impacts her ability to effectively teach in the future because students and administrators cannot rely on her ability to maintain a safe and healthy learning environment in the classroom.

(*Id.* at 14-16).

The Appellant filed exceptions to the Proposed Decision. We heard oral argument on whether corporal punishment occurred and whether Appellant's action bore on her fitness to teach, as well as whether the sanction was too severe.

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 and affirm the sanction. COMAR 13A.01.05.05F(1) and F(3).

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.

LEGAL ANALYSIS

A. Did corporal punishment occur?

Maryland Education Article §7-306(a) provides that "a principal, vice principal, or other employee may not administer corporal punishment to discipline a student in the State." Maryland regulations also preclude the use of corporal punishment. COMAR 13A.08.01.11(E). Neither the law nor the regulations define "corporal punishment."

We have considered the evolution of the "corporal punishment" concept in Maryland. Prior to 1993 there were few, if any, limits on the use of physical force or the imposition of physical punishment on students. *See e.g. Bd. of Educ. v. Waeldner,* 298 Md. 354, 357-358 (1984) (where a teacher of special education students made one of them kneel on wooden blocks, outside, in the snow to "modify" bad behavior; State Board reversed the teacher's termination). In 1993, Maryland out-lawed corporal punishment in our schools. Md. Educ. Code Ann. §7-306. Thereafter, local school systems undertook to define "corporal punishment" since, *inter alia,* imposing it on students could have employment consequences. Today, as best we can tell, twelve of the twenty-four school systems have defined corporal punishment in some way. Some say it is physical contact intended as *"punishment"*.

School District	Definition
Anne Arundel County	Corporal punishment is defined as punishment inflicted through physical means by an adult to the body of a student.
Montgomery County	Intentionally inflicted physical penalty administered by a person in authority.
Washington County	Corporal punishment is a bodily punishment such as spanking or striking someone with a hand. Shaking, pinching, or any contact intended to inflict pain may also be considered corporal punishment.

Others included physical contact for *"corrective"* purposes in the definition.

School District	Definition
Baltimore City	Any deliberate striking, paddling, application of an object or body part against the body of a student, or any other physical punishment used as a corrective or retaliatory measure against a student.
Carroll County	Physical punishment used by a person of authority to correct student misbehavior.
Harford County	Intentional use of physical force upon a student for any alleged offense or behavior, or the use of physical force in an attempt to modify the behavior, thoughts, or attitudes of a student.
Talbot County	The Board believes it is inappropriate for teachers, principals, or other school personnel to use corporal punishment as a means to correct misbehavior. Furthermore, the Board believes it is counterproductive for school personnel to unduly or deliberately cause mental or physical pain or discomfort for students through the use of cruel or unusual means outside the reasonable pursuit of learning objectives.

And some generically state that corporal punishment is physical contact for the purpose of *"discipline"*.

School District	Definition
Calvert County	Physical punishment or undue physical discomfort inflicted on the body of a student for the purpose of maintaining discipline or to enforce school rules.
Charles County	Corporal punishment may not be used to discipline a student in a public school in the State.
Frederick County	Corporal punishment, defined as any intentional physical contact used in the act of disciplining a child, is prohibited.
Howard County	Physical penalty or undue physical discomfort inflicted on the body of a student for the purpose of maintaining discipline or to enforce school rules.
Somerset County	Notwithstanding any bylaw, rule, or regulation made or approved by the State Board, a principal, vice-principal, or any other SCPS employee, volunteer, or guest may not administer corporal punishment in order to discipline any student or child enrolled in or visiting Somerset County Public Schools or involved in any activity under the supervision of Somerset County Public Schools.

As set forth above, the Baltimore City Board of School Commissioners in Policy JKA and JKA-RA defines corporal punishment as "any deliberate striking, paddling, application of an object or body part against the body of a student or any other physical punishment used as correction or retaliating measure." The local board strictly construes that definition to cover Appellant's action here. As local board counsel explained in oral argument, it is the position of the local board that no staff person should attempt to correct a student by using physical contact with the student unless the student is doing or attempting to do something harmful to herself or another. Indeed, Maryland law recognizes the authority of staff to intervene in such instances.

Maryland Education Article §7-307 provides in pertinent part:

> (a) Authority to intervene; degree of force.
>
> (1) A principal, teacher, school security guard, or other school system personnel in any public school may take reasonable action necessary to prevent violence on school premises or on a school-sponsored trip, including intervening in a fight or physical struggle that takes place in his or her presence, whether the fight is among students or other individuals.
> (2) The degree or force of the intervention may be as reasonably necessary to prevent violence, restore order and to protect the safety of the combatants and surrounding individuals....

We considered the implication of all those provisions in 2009 in *Brown v. Baltimore City Bd. of School Commissioners,* MSBOE Op. No. 09-31 (September 21, 2009). In that case, we affirmed the termination of a teacher who slapped a sixth grade student across the face in violation of local board rules prohibiting corporal punishment. In *Brown,* the Appellant teacher argued that she was acting in self-defense to protect herself from a student. The Appellant in *Brown* had no prior history of striking students and had favorable evaluations during her employment with BCPSS.

We concluded that "it was unreasonable for the Appellant to have characterized her response as an acceptable form of self-defense." We ruled that even though the Appellant had given the student verbal commands to back away from her that went unheeded, "teachers cannot use corporal punishment against students to try to modify student behavior." *Id.* at p. 13. We emphasized that "a teacher must use the least threatening and least potentially injurious contact which maintains the integrity of the teaching environment." We found that the Appellant's conduct "was an unreasonable and unwarranted exercise of corporal punishment."

In this case, the student was undoubtedly out-of-control in the classroom.[1] The record reflects, however, that the student was not violent, not threatening physical harm to any other student or the teacher. The Appellant grabbed for her, they fell, and the Appellant pulled her up to get her out of the classroom. In doing so, while she did not grab AR to punish her, she did grab her to correct her behavior. Such action falls within the definition of corporal punishment

[1] We initially thought that she was using the magic marker on the bare screen of the overhead projector in an attempt to destroy that school property. It appears from the record, however, that she was writing on a piece of paper placed on that screen. (T.107).

in Baltimore City Schools. Even though that is a strict application of the corporal punishment rule, we do not find it to be an unreasonable application.

Suffice it to say that we have moved far away from the days of striking or paddling or grabbing students, toward a general prohibition against physical contact with a student, particularly to stop bad behavior that presents no risk of harm to others. The local board's definition falls on that end of the spectrum.

B. Do Appellant's actions bear on her fitness to teach?

As we said in *Brown,* the case in which the teacher slapped the student, arguing self-defense:

> ...in Maryland the teacher's conduct must bear on the teacher's fitness to teach in order to constitute misconduct....[P]rofessional composure is a critical attribute to teach effectively. Moreover, the exercise of good judgment, not poor judgment, bears on that ability also. The Appellant demonstrated a complete loss of professional composure and exercised exceedingly poor judgment.
>
> Violence in school remains a significant concern. Our school systems focus great efforts on teaching students alternative means of dealing with conflict and how to deescalate conflict. To say the least, the Appellant's actions here undermined those efforts.

Id. at 7

In the present case, the Appellant was terminated for violating BCPSS rules and policies prohibiting corporal punishment of students. It is clear from the evidence presented at the hearing, and in particular, the testimony of the Appellant, that the Appellant exerted physical contact upon a student more than once during the incident. She lost control of herself, exercised poor judgment not only by the physicality of the incident, but by failing to call for assistance which she herself testified she wished she had done. (T.112). It is our view that the misconduct here bears on the Appellant's fitness to teach.

C. Is the sanction too severe?

The record reflects that the Appellant was a good teacher, highly regarded, a team leader, and an asset to the school. She worked for 23 years for the City Schools and her record was unblemished. She handled discipline problems that arose in her classroom and did not want to put students out of her class. She had worked successfully with AR's behavior problems, discussed them with AR's father, and it appears from the record that the Appellant had developed methods to handle AR. (T. 101-102).

This one event on November 7, 2010 ended her successful career as a teacher. She was suspended without pay on January 30, 2012. (T. 69). She was terminated on April 9, 2013.

We have the authority to review the severity of the sanction and set it aside if we conclude that circumstances warrant it. *See Board of Education v. Waeldner,* 298 Md. 354 (1984); *Board of Education v. McCrumb,* 52 Md. App. 507 (1982).

We considered the severity of the sanction in the *Brown* case. We noted that Brown was a teacher for nine years before her employment in Baltimore City in the 2000-2001 school year, that her ratings were consistently satisfactory or proficient, that she had no other incidents of inappropriate physical contact with students. Yet, we did not reduce the sanction because:

> . . .
>
> Appellant slapped a sixth grade student across the face at a time and location where other students and an adult witnessed her actions, and that the slap was hard enough to make the student cry and leave an area on the student's face red...[t]his incident undermined the confidence that parents, students, and school officials have in Appellant's ability to maintain a safe and healthy learning environment at the school...Appellant had been warned in the past regarding her unprofessional interaction with parents and/or students, her need to help students develop a sense of order and safety, and her responsibility to maintain a safe classroom.

Brown, MSBOE Op. No. 09-31 at 8.

In the *Brown* case, the existence of past unprofessional conduct (use of profanity with students) was a factor in holding firm on the sanction. Here, there is no record of any past occurrences of unprofessional conduct.

The role of Assistant Principal Washington in the events of the day concern us. They are not easily understood from the record. The Appellant describes Ms. Washington as "standing in her doorway" after Appellant lifted AR up and moved her towards the door. (T. 108). In oral argument before this Board, Appellant's counsel asserted that Assistant Principal Washington had escorted AR back to the classroom. There is no testimony about that fact, but it is contained in the Investigator's Report which was based, in part, on the investigator's interview with AR.

AR told the investigator:

- That on 11/17/10 she came to class and was talking while Ms. Price was working with the projector. She stated that Ms. Price asked her to stop talking and yelled at another student to shut up. Ms. Price thereafter asked her to leave the classroom and to go to the office for continuing to talk in class.
- That while leaving the class, she yelled out "It's not fair" and then she slammed the door.

- That she went to the office and told the Assistant Principal, Ms. Washington, that she was told to go to the office for talking in class. Ms. Washington escorted her back to class and after Ms. Washington left, AR got up and walked to the door.[2]

Thereafter, the altercation between the Appellant and AR occurred, and the Assistant Principal appeared at the classroom door. There is no testimony about why she was there at that moment or whether she escorted the student back to class. Indeed, there is a startling lack of testimony on that point. The Assistant Principal was not called as a witness. Apparently, she no longer worked at the school at the time of the hearing. (T.20).

We cannot fill in the holes in the record with speculation about whether the Assistant Principal knew there was trouble brewing between AR and Appellant and whether she should have done something to ease the tension. In the usual course of events, if a student is sent to the office for being disruptive, the principal or assistant principal will confer with the teacher before returning the student to class. COMAR 13A.02.01.11(C)(7). Obviously, that did not occur, but we cannot speculate as to why.

Given the facts that we have, like the ALJ, we must balance the teacher's excellent record against the events of November 17, 2010. In that regard, the reasoning of the ALJ may be helpful.

The ALJ looked back to the *Brown* case for guidance:

> In *Brown,* I noted that when the teacher slapped the student, other students and parents observed the incident and this misconduct undermined the confidence that the students, parents, and school administrators have in the teacher's ability to maintain a safe and healthy learning environment at school.
>
> In this case, the Appellant lost her composure and control over the situation involving AR by making physical contact with the student in an effort to remove her from the classroom. The inability of the Appellant to maintain composure and control in a situation where a student is not behaving and is disrupting the class is characteristic of an unfitness to teach. The Appellant's misconduct was observed by several students. Right after the incident, on the same day, the students in the classroom during the incident were asked to provide a written statement of what they observed. The students' written statements were admitted into evidence during the local board hearing and are before me for consideration. *See* CEO Ex. #5....One student described the incident as the Appellant grabbing AR by the neck, throwing her to the ground and it was "like payment" – inferentially for AR's misconduct. Another student wrote that the Appellant "bum-rushed" AR to the floor. Another student wrote that the Appellant

[2] These statements reflect a different scenario from the Appellant's sworn testimony about how and why AR left the classroom.

> jumped on AR like a soldier and was hitting AR in the head. Another student wrote that the Appellant tackled AR so hard that he or she thought it was a football game. Finally, another student wrote that the Appellant tackled AR for meddling with her object and disrupting her class. I consider these written statements as demonstrating a descriptive student experience of an unsafe school environment that is not conducive to learning. I find these students' statement to be persuasive descriptions of the Appellant's unfitness as a teacher. In essence, after this incident, it is improbable that students and school administrators can rely on the Appellant to provide a safe and healthy learning environment.[3]

We have considered that the Appellant's termination reflects the zero tolerance approach we have castigated in the context of student discipline. There we have called for a reasoned consideration of all the facts and circumstances before deciding on a sanction, not a blind application of a rule. Yet, we understand that even in that context some rules, when broken, call for strong, decisive, immutable action. In Baltimore City, physical contact with a student who is not physically harming herself or others is deemed such a rule. Thus, we return to the words we wrote in the *Brown* case:

> Our school systems focus great effort on teaching students alternative means of dealing with conflict and how to deescalate conflict. To say the least, the Appellant's actions here undermined those efforts.

Likewise, in this case, Appellant's actions undermined the school system's work to make the schools safe, to reduce conflict, and teach students alternative means to deal with conflict. Adults need to be the role models for that effort. In this case, the Appellant was not a role model. As the ALJ pointed out:

> ... I cannot overlook that the Appellant's students saw a teacher who is supposed to be a role model of behavior tackle another student "like a solider" or as if she were "in a football game." Perhaps, the Appellant's own statement in the October 2010 Performance Based Evaluation demonstrates how this incident negatively impacts her ability to teach in the future when she wrote " that she will model all expectations for her students because most are visual." (App. Ex. #7). After this incident, any prior behavior modeling by the Appellant has been cast aside for a new behavior model, witnessed by several students, that included corporal punishment for inappropriate student behavior. As a result, I must conclude that the Appellant's misconduct on November 17, 2010 negatively impacts her ability to effectively teach in the future

[3] The Appellant argues that the statements are untrustworthy hearsay and should not have been considered by the ALJ. The statements, however, were not used to prove the truth of the matters asserted, but to describe the students' state of mind as they witnessed they event. As such, they were admissible. *McLain, Maryland Evidence* §801:10.

> because students and administrators cannot rely on her ability to maintain a safe and healthy learning environment in the classroom.

ALJ Proposed Decision at 16.

In this case, the ALJ, the local board, and the local board's Hearing Officer all concluded that the sanction for this one offense was not too severe. For all the reasons stated herein, we concur.

CONCLUSION

For all these reasons, we adopt the ALJ's Proposed Decision as our Final Decision affirming the local board.

Charlene M. Dukes
President

Mary Kay Finan
Vice President

James H. DeGraffenreidt, Jr.

Dissent
Linda Eberhart

Absent
S. James Gates, Jr.

Absent
Larry Giammo

Luisa Montero-Diaz

Absent
Sayed M. Naved

Dissent
Madhu Sidhu

Donna Hill Staton MLP
Donna Hill Staton

Guffrie Smith - MCP

Guffrie M. Smith, Jr.

June 27, 2014

DEBORAH PRICE,	*	**BEFORE DANIEL ANDREWS**
APPELLANT	*	**ADMINISTRATIVE LAW JUDGE,**
v.	*	**MARYLAND OFFICE OF**
BALTIMORE CITY BOARD OF	*	**ADMINISTRATIVE HEARINGS**
SCHOOL COMMISSIONERS	*	**OAH No.: MSDE-BE-01-13-18387**

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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 January 25, 2012, Dr. Andres Alonso, the Chief Executive Officer (CEO) of the Baltimore City Public Schools (BCPS), notified Deborah Price (Appellant), a teacher assigned to the William C. March Middle School (March Middle), that he was recommending to the Baltimore City Board of School Commissioners (BCBSC or Local Board) [1] that she be terminated on the grounds of misconduct and willful neglect of duty, pursuant to Section 6-202(a) of the Education Article of the Maryland Annotated Code.[2]

On February 22, 2013, Vivian Nunez, Esq., a hearing examiner (Hearing Examiner) for the BCBSC, conducted a hearing on behalf of the Local Board. During the hearing, the Appellant was

[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 as "Education Article" and to the version found in the 2008 Replacement Volume or the 2013 Supplement.

present and represented by counsel. The Local Board was also represented by counsel. On March 9, 2013, the Hearing Examiner issued a written decision recommending that the Local Board affirm the CEO's decision to terminate the Appellant. On April 9, 2013, the Local Board reviewed the recommendation by the Hearing Examiner and voted to affirm her recommendation to uphold the CEO's decision to terminate the Appellant.

On May 6, 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 May 13, 2013, the State Board forwarded the Appellant's appeal to the Office of Administrative Hearings (OAH) for a contested case hearing. On May 30, 2013, the Local Board filed a Response to the appeal.

On July 16, 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 September 12, 2013, I conducted a contested case hearing at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. COMAR 13A.01.05.07. The Appellant was present and was represented by Keith J. Zimmerman, Esquire. Lori Branch Cooper, Associate Counsel for the Local Board, represented the Local Board.

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 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.

[3] COMAR 13A.01.05.01B(10) defines "State Board" as the State Board of Education.

ISSUES

1) Did the Appellant's physical contact with a student[4] amount to misconduct in office and willful neglect of duty, as set forth in section 6-202 of the Education Article?

2) Is termination of her employment with BCPS the appropriate sanction?

SUMMARY OF THE EVIDENCE

Exhibits

As requested by the parties, a copy of the exhibits presented during the Local Board hearing held on February 22, 2013, 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 the record which was created during the Local Board hearing. During the Local Board hearing, the Local Board's exhibits were referred to as "*CEO* Exhibits" and the Appellant's exhibits were referred to as "*Appellant's* exhibits." For consistency, when referencing the exhibits admitted during the Local Board hearing, I have used the same terminology:

- January 25, 2013 Letter and Statement of Charges
- Transcript of Local Board Hearing held on February 22, 2013[5]
- Local Board Exhibits:

CEO Ex. #1- November 17, 2010 Email

CEO Ex. #2- November 18, 2010 Email

CEO Ex. #3- March 1, 2011 Memo

CEO Ex. #4- Letters and Envelope

CEO Ex. #5- November 9, 2011 Memo with Investigative Report

[4] In the transcript of the hearing before the Local Board, the specific student involved was referred to as AR to preserve the confidentiality of her identity. When necessary and for consistency, I will use the same abbreviation when referring the student.

[5] Any reference to the transcript shall be as "T." and the appropriate page number where the reference is located.

CEO Ex. #6- November 24, 2011 Letter

CEO Ex. #7- January 25, 2012 Letter

CEO Ex. #8- December 21, 2012 Letter

CEO Ex. #9- Baltimore City Police Officer Seay's Incident Report

- Appellant's Exhibits:

App. Ex. #1- Daily Attendance by Homeroom

App. Ex. #2- Employee Handbook

App. Ex. #3- October 10, 1989 Letter

App. Ex. #4- Resume

App. Ex. #5- May 12, 2003 Letter

App. Ex. #6- Annual Evaluations

App. Ex. #7- Initial Planning Conference Form

App. Ex. #8- Character Reference Letters

- BCBSC Letter, dated March 13, 2013 with attached Hearing Examiner, dated March 9, 2013
- BCBSC Letter, dated April 10, 2013, with attached Order by the BCBSC, dated April 9, 2013
- BCBSC Policy, Student Discipline

Testimony

The parties did not present any testimony. Instead, the parties relied on the testimony provided during the Local Board hearing held on February 22, 2013.

FINDINGS OF FACT

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

Background

1. The Appellant has a bachelor's degree from Morgan State University in elementary education. (T. 74-75).
2. After attending Notre Dame of Maryland University, Towson University, and Coppin State University, the Appellant earned a master's equivalency. (T. 75, App. Ex. #4).
3. The Appellant is a certified teacher by the MSDE and possesses an Advanced Professional Certificate. (T. 75).
4. The Appellant is certified to teach kindergarten through eighth grade. (T. 75).
5. The Appellant has been employed as a teacher by BCPS since 1987. (T. 76).
6. The Appellant obtained tenure from the BCPS effective August 30, 1989. (T. 77, App. Ex. #3).
7. From 1987 through 2010, the Appellant consistently received annual employee evaluations that indicated that the Appellant met expectations or was proficient as a teacher. (App. Ex. #6). These annual evaluations characterized the Appellant as exemplary, committed, devoted, hard working, an asset to teaching, an invaluable asset, and the epitome of the model teacher. (App. Ex. #6).
8. The Appellant has never been disciplined by any supervisor in the BCPS. (T. 97).
9. The Appellant started teaching at March Middle in 2007. (T. 76, App. Ex. #4).
10. March Middle is known as a turn-around school, which is a school that has not met its benchmarks for several years and, as a result, the school district has placed additional

resources in the school and has established community partnerships between it and organizations like the Johns Hopkins University, in an effort to turn around the academic achievement of its students. (T. 31-32).

11. While at March Middle, in addition to her teaching duties, the Appellant has been active in a variety of leadership roles, school organizations or programs, including Team Leader, Vice Chair or Secretary to Hospitality Organization, After School Tutorial Program, The Read-Write Workshops, New Teacher Mentor, and Baltimore Teacher Union President. (App. Ex. #4).
12. During the 2010 – 2011 school year, the Appellant was assigned as a Language Arts teacher at March Middle. (T. 16).
13. At the time, the principal of March Middle was Eugene Christopher Chong Qui. (T. 14).
14. In October 2010, Principal Chong Qui performed a Performance Based Evaluation of the Appellant through which he observed that the Appellant holds students accountable and maintains high expectations for all students. (App. Ex. #7).
15. In the same evaluation, the Appellant provided several strategies to increase student achievement, including that she will "model all expectations for her students because most are visual [learners]". (App. Ex. #7).
16. In November 2010, AR was an average-sized female student in the sixth grade at March Middle. (T. 41).
17. Prior to November 2010, Principal Chong Qui was not aware of any specific concerns between the Appellant and AR. (T. 30).

18. Principal Chong Qui was aware that AR was a challenging student demonstrating behaviors like running in the halls, not being in assigned areas of the buildings at necessary times and being a "mouthy" kid. (T. 34).

19. AR had issues controlling herself in the class environment. (T. 41).

November 17, 2010 – The Incident

20. On November 17, 2010, AR came into the Appellant's classroom for her Language Arts class. (T. 105).

21. In the Appellant's classroom, AR has an assigned seat for the purpose of controlling AR's behavior. (T. 105).

22. AR wanted to move to another seat, which the Appellant did not permit, but AR took the other seat anyway. (T. 105).

23. After the Appellant directed AR back to the assigned seat, AR moved to a different seating location. (T. 105).

24. Again, the Appellant attempted to direct AR back to the assigned seat, but instead of returning to the assigned seat, AR left the classroom. (T. 105).

25. As AR left the classroom, the Appellant informed AR that she could not return to the classroom without a pass from the school administrator. (T. 105).

26. After AR left the classroom, the Appellant continued with the lesson for the students in her class. (T. 106).

27. Shortly afterward, AR returned to the classroom, and screamed "I am the teacher." (T. 106).

28. At that time, the Appellant was in the back of the classroom and AR was in the front near an overhead projector. (T. 106).

29. The Appellant began to move to the front of the room toward AR. (T. 106). As the Appellant moved toward the front of the classroom, AR grabbed a magic marker from the Appellant's desk and began to write on the overhead projector. (T. 106-107).

30. When the Appellant got to AR, the Appellant placed her hand on AR's arm and in the process both the Appellant and AR fell to the floor. (CEO Ex. #5 (Appellant's Statement to BCPS Investigator)). While on the floor, the Appellant continued to keep AR in a hold with her other arm and talked with AR about her behavior. (CEO Ex. #5 (Appellant's Statement to BCPS Investigator)). The Appellant lifted AR from the floor and began escorting AR out of the classroom. (CEO Ex. #5 (Appellant's Statement to BCPS Investigator))

31. As the Appellant was pulling AR up from the floor to escort her out of the classroom, Assistant Principal Washington was at the classroom door and ordered the Appellant to step outside into the hallway. (T. 108)

November 17, 2010 – Post-Incident Events

32. Assistant Principal Washington reported the incident to Principal Chong Qui. (T. 20)

33. Principal Chong Qui ordered an investigation and reported the incident to the Baltimore City Police. (T. 23). Baltimore City Police reported the incident to Child Protective Services (CPS). (T. 23).

34. As a part of the investigation, Assistant Principal Washington and another teacher, Ms. Addison, obtained a written statement from AR and several other students who observed the incident. (T. 24).

35. Principal Chong Qui spoke with the Appellant and AR about the incident. (T. 23). However, Principal Chong Qui did not create a written record of any statements made by the Appellant or AR.

36. Baltimore City Police Officer Seay, who was assigned to March Middle, spoke with the Appellant and AR and created a record of those statements by writing a police report. (CEO Ex. #9).

Other Post-Incident Events

37. After CPS concluded its investigation, Jerome Jones, Manager for Labor Relations, BCPS, completed the original BCPS investigation by obtaining a statement from AR on May 4, 2011 and a statement from the Appellant on June 11, 2011, and reviewing the written statements of other students obtained on November 17, 2010. He issued a final investigative summary on November 9, 2011. (CEO Ex. #5, T. 51).

38. On February 22, 2013, during the Local Board hearing, on direct examination, the Appellant admitted that she reached for AR, AR moved, and the Appellant reached for her again. (T. 107). The Appellant's goal was to remove AR from the classroom and that's when they went down "really quick, really fast." (T. 107). The Appellant also admitted that she then picked AR up and moved her towards the door. (T. 108).

39. During cross-examination, the Appellant admitted that she made physical contact with AR and that it was inappropriate. (T. 114). Additionally, the Appellant explained the incident by testifying that when she reached for AR, AR moved, got away, and the Appellant reached for her again. (T. 115). The Appellant believed one of them probably lost their balance and in the process they went down but reasserted that her purpose was to remove AR from the classroom. (T. 115-116).

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:

> (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.

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:

> (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.

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 misconduct or a willful neglect of duty and whether termination of her employment was an appropriate sanction.

In this case, the BCPS charged the Appellant with committing misconduct and a willful neglect of duty based on allegations that the Appellant exercised corporal punishment upon AR. Corporal punishment is prohibited by Section 7-306(a) of the Education Article, which provides:

> Notwithstanding any bylaw, rule, or regulation made or approved by the State Board, a principal, vice principal, or other employee may not administer corporal punishment to discipline a student in a public school in the State.

Additionally, State regulations provide that corporal punishment may not be used to discipline a student in a public school. COMAR 13A.08.01.11E.

Consistent with the statutory and regulatory law, the BCBSC has a policy which states that Baltimore City Schools shall be governed without corporal punishment. BCBSC, Policy and Regulations Manual, Section JKA – Student Discipline, III – Policy Standard, Paragraph A. The BCBSC policy defines corporal punishment as any deliberate striking, paddling, application of an object or body part against the body of a student, or any other physical punishment used as a corrective or retaliatory measure against a student. BCBSC, Policy and Regulations Manual, Section JKA – Student Discipline, II – Definition, Paragraph A. The purpose of the BCBSC policy is to establish a commitment to providing a safe and orderly classroom for all students. BCBSC, Policy and Regulations Manual, Section JKA – Student Discipline, I – Purpose, Paragraph A.

The BCPS Employee Handbook establishes the standards of conduct for all BCPS employees and the disciplinary process for any violations. The BCPS Employee Handbook provides for corrective action of standards of conduct violations as follows:

> [BCPS] holds all employees to certain work rules and standards of conduct. When employees deviate from these rules and standards, [BCPS] expects their supervisors to take corrective action. Corrective action at [BCPS] is progressive. That is, the action taken in response to a rule infraction or violation of standards typically increases in seriousness until the infraction or violation is corrected or such action requires more significant disciplinary action. Though committed to a progressive approach to corrective action, [BCPS] considers certain rule infractions and violations of standards as grounds for immediate termination of employment.

BCPS Employee Handbook, Section 10 – Standards of Conduct, 10.16 – Corrective Action.

Additionally, the BCPS Employee Handbook defines certain actions as Serious Misconduct and in these instances corrective action will be taken, up to and including termination. BCPS Employee Handbook, Section 10 – Standards of Conduct, 10.17 – Serious Misconduct. The section on Serious Misconduct provides a non-exhaustive list of actions which may constitute grounds for immediate termination, including "unsatisfactory performance or conduct." *Id.*

Finally, in the context of teacher misconduct, the Maryland Court of Appeals, in *Resetar v. State Board of Education,* 284 Md. 537 (1979), considered the definition of misconduct to include a "transgression of some established and definite rule of action" and that "to be grounds for dismissal the act must bear on the teacher's fitness to teach." *Id.* at 561. In upholding the dismissal of a teacher for using offensive language, the *Resetar* Court concluded that the State Board properly concluded that the offensive remark of the teacher might undermine future classroom performance and have an overall impact on students. *Id.*

Analysis

The Appellant does not contest that she used corporal punishment by making physical contact with AR for the purpose of removing the student from the classroom. The evidence established that AR was not sitting in her assigned seat, did not comply with the Appellant's request to sit in the assigned seat, left the classroom and returned without a pass from an administrator, re-entered the classroom and began to cause a disruption to the entire classroom. The Appellant admitted that she grabbed the student and that after making physical contact with her, both the Appellant and the student fell to the floor. The Appellant also admitted that she pulled the student up from the floor to escort her out of the classroom. Without dispute, these facts establish that the Appellant used corporal punishment in violation of State law and BCPS policy. Education Article §7-306; COMAR 13A.08.01.11E; BCBSC, Policy and Regulations Manual, Section JKA – Student Discipline.

The Appellant concedes she violated the established school law and policy regarding the application of corporal punishment and the evidence supports this finding. For this reason, I conclude that she committed misconduct and a willful neglect of duty pursuant to Education Article, Section 6-202(a)(1)(ii), (v).

The contested issue between the parties is whether termination is the appropriate sanction or should some other form of corrective action be imposed. During the Local Board hearing and in the hearing before me, the Appellant contends that termination is too severe a sanction to impose and that another sanction, consistent with the progressive discipline process, should be recommended. The Appellant urges me to consider her years of teaching experience, the lack of any disciplinary action throughout her career, and the consistent positive evaluations and high praise earned during her years of service with BCPS. Against this background, the Appellant asserts that a sanction less

than termination would be appropriate. The Appellant seeks a period of suspension without pay of approximately ten days to two weeks.

The Local Board contends that, despite the Appellant's employment history, the use of corporal punishment amounts to a serious violation of school policy and justifies termination. Further, the Local Board argues that, consistent with *Resetar*, termination is appropriate because the incident bears on the Appellant's fitness to teach. Additionally, the Local Board asks that I consider as having persuasive value a previous decision that I issued which was later affirmed by the State Board. *See Sharon Brown v. BCBSC*, MSDE-BE-01-08-33126, issued March 9, 2009, *affirmed by* State Board, Opinion No. 09-31, September 21, 2009 (*Brown*). In *Brown*, a teacher with seventeen years of experience who applied corporal punishment to a student by reflexively slapping the student across the face was terminated from employment with the BCPS. Finally, the Local Board urges that I recommend termination because any other form of corrective action would set a dangerous precedent for future violators of the corporal punishment policy.

The issue presented is challenging. Prior to the incident, the Appellant had twenty-three years of teaching in the BCPS system, during which she received the highest level of annual evaluations, was involved in many activities in addition to her teaching duties, received awards for her teaching, and has been described as exemplary and a model teacher by her supervisors. Additionally, the Appellant has never been disciplined during her career with the BCPS system. For these reasons, when considering the ultimate sanction of termination, a thoughtful balancing of the Appellant's past performance against the impact of her misconduct on her ability to teach is critical.

I have considered *Brown* and its impact on this case. *Brown* is factually distinct from this case because the teacher in *Brown* had previous performance evaluations which demonstrated she

had unprofessional interactions with students or parents, needed to help students develop a sense of order and safety, and had been warned of her responsibility to maintain a safe classroom environment. An element that was important in *Brown*, as in *Resetar,* was the impact of the teacher misconduct on the teacher's fitness to teach and the overall impact on students. In *Brown*, I noted that when the teacher slapped the student, other students and parents observed the incident and this misconduct undermined the confidence that students, parents, and school administrators had in the teacher's ability to maintain a safe and healthy learning environment at school.

In this case, the Appellant lost her composure and control over the situation involving AR by making physical contact with the student in an effort to remove her from the classroom. The inability of the Appellant to maintain composure and control in a situation where a student is not behaving and is disrupting the class is characteristic of an unfitness to teach. The Appellant's misconduct was observed by several students. Right after the incident, on the same day, the students in the classroom during the incident were asked to provide a written statement of what they observed. The students' written statements were admitted into evidence during the Local Board hearing and are before me for consideration. *See* CEO Ex. #5. I understand that counsel for the Appellant argues that these statements are untrustworthy since there is no factual predicate that demonstrates their reliability. However, the statements are in evidence and are appropriate to consider on the issue of how the Appellant's conduct impacted these students and their sense of school safety and a healthy learning environment. One student described the incident as the Appellant grabbing AR by the neck, throwing her to the ground and it was "like payment" -- inferentially for AR's misconduct. Another student wrote that the Appellant "bum-rushed" AR to the floor. Another student wrote that the Appellant jumped on AR like a soldier and was hitting AR in the head. Another student wrote that the Appellant tackled AR so hard that he or she thought it

was a football game. Finally, another student wrote that the Appellant tackled AR for meddling with her objects and disrupting her class. I consider these written statements as demonstrating a descriptive student experience of an unsafe school environment that is not conducive to learning. I find these students' statements to be persuasive descriptions of the Appellant's unfitness as a teacher. In essence, after this incident, it is improbable that students and school administrators can rely on the Appellant to provide a safe and healthy learning environment.

The Appellant has presented some evidence that she was dealing with personal issues at the time of the incident that may have led to her losing her control of her reaction to AR. The Appellant also argued that it was a momentary lapse in judgment. However, no matter how isolated this incident and her personal issues may have been, I cannot overlook that the Appellant's students saw a teacher who is supposed to be a role model of behavior tackle another student "like a soldier" or as if she were "in a football game." Perhaps, the Appellant's own statement in the October 2010 Performance Based Evaluation demonstrates how this incident negatively impacts her ability to teach in the future when she wrote "that she will model all expectations for her students because most are visual." (App. Ex. #7). After this incident, any prior behavior modeling by the Appellant has been cast aside for a new behavior model, witnessed by several students, that includes corporal punishment for inappropriate student behavior. As a result, I must conclude that the Appellant's misconduct on November 17, 2010 negatively impacts her ability to effectively teach in the future because students and administrators cannot rely on her ability to maintain a safe and healthy learning environment in the classroom.

After balancing the Appellant's prior teaching record against the dramatic impact this incident had on her fitness as a teacher, I conclude that the appropriate sanction is termination.

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 BCPS policy by using corporal punishment on a student on November 17, 2010. Education Article Section 7-306; COMAR 13A.08.01.11E; BCBSC, Policy and Regulations Manual, Section JKA – Student Discipline.

I further conclude as a matter of law that the Local Board established that the Appellant committed misconduct and willful neglect of duty using corporal punishment on a student. Education Article, Section 6-202(a)(1)(ii), (v).

Finally, I conclude as a matter of law that the Appellant's misconduct on November 17, 2010 negatively impacts her fitness to teach and that termination of her employment with BCPS 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 misconduct and willful neglect of duty should be **AFFIRMED**.

December 11, 2013
Date Decision Mailed

Daniel Andrews
Administrative Law Judge

DA/da
146397

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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