

IN THE MATTER OF THE ARBITRATION BETWEEN

ANOKA-HENNEPIN	)	MINNESOTA BUREAU OF
EDUCATION MINNESOTA,	)	MEDIATION SERVICES
	)	CASE NO. 12-PA-0131
	)	
	)	
Union,	)	
	)	
and	)	
	)	
INDEPENDENT SCHOOL DISTRICT	)	
NO. 11 (ANOKA-HENNEPIN),	)	DECISION AND AWARD
	)	OF
Employer.	)	ARBITRATOR

APPEARANCES

For the Union:

David M. Aron  
Attorney  
Education Minnesota  
41 Sherburne Avenue  
St. Paul, MN 55103

For the Employer:

Paul H. Cady  
General Counsel  
Independent School District  
No. 11 (Anoka-Hennepin)  
11299 Hanson Boulevard, N.W.  
Coon Rapids, MN 55433

On January 10, 2012, in Anoka, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by issuing a Letter of Deficiency to the grievant, Heidi L. Monroe, and by

suspending her for five days without pay. Post-hearing written argument was received by the arbitrator on February 12, 2012.

#### FACTS

The Employer (sometimes, the "District") operates the public schools in a large school district in the northern suburbs of Minneapolis and St. Paul, Minnesota. The Union is the collective bargaining representative of about 2,700 licensed Teachers employed by the Employer.

The grievant has been employed by the Employer since the 2002-2003 school year, working as a Special Education Teacher at the Oxbow Creek Elementary School ("Oxbow"). She works in a classroom where developmentally and cognitively disabled ("DCD") children receive special education in accord with an Individualized Education Plan ("IEP"). These students have the chronological age equivalent to students in the second through fourth grades. The number of students taught in her classroom ranges from six to eight. Usually, she is assisted by one Paraeducator ("Para") for each two students assigned to her classroom.

At the start of the 2010-2011 school year, six DCD students were assigned to the grievant's classroom, and she was assisted by three Paras. On February 15, 2011, a seventh DCD student ("SP") was assigned to her classroom, after he transferred from the Minneapolis school district. His IEP from that district stated that he was ten years old, that he was non-verbal and severely autistic, that he wears a diaper and sometimes digs into his diaper leaving fecal matter under his fingernails and that he resists hygienic care such as hand washing and nail care.

When SP was assigned to the grievant's classroom, the Employer assigned a fourth Para there to assist her.

On April 8, 2011, Rolf M. Carlsen, Principal of Oxbow, issued the following Letter of Deficiency to the grievant and suspended her for five days without pay:

Pursuant to Minn. Stat. Section 122A. 40, Subd. 9, as well as the collective bargaining agreement between the District and [the Union], this letter represents a formal Letter of Deficiency and notice of a five-day unpaid suspension for your failure to meet district expectations with your job performance. You will serve your unpaid suspension April 12-18, 2011.

The basis for this reprimand is your failure to meet district expectations, specifically your failure to provide an acceptable standard of care and provide adequate and appropriate supervision expected from you as a Special Education teacher. On March 7th, 2011, you were understandably concerned about the cleanliness of student SP's fingernails and the potential health concerns for both him and staff. Instead of bringing student SP to the health office for assistance as you had done on his first day of school, you kept student SP in your classroom and directed two paraeducators to assist you in forcibly cleaning and clipping his fingernails. You did this without contacting or consulting with his foster mother about the situation and without contacting Oxbow administration or special education administration. You and one paraeducator forcibly held student SP in a chair while another paraeducator attempted to clip his nails. Despite student SP vomiting more than once and his repeated attempts to stop you or get away from you all, you directed the paraeducators to continue with the restraining, cutting and cleaning. Student SP's foster mother called that evening to report that he had bruises on each thigh that had not been there in the morning. She also reported at least three other previous occasions when SP had come home with minor injuries from his time at school. Our internal investigation of these complaints was unable to substantiate the origin of the bruises and other minor injuries.

As your supervisor, I have significant concerns about your judgment and decision-making with regard to the actions you have taken with student SP, as well as the actions you failed to take. The fact that you hadn't called an IEP team meeting to address your concerns

shortly after student SP enrolled at Oxbow, the fact that you hadn't met with foster mom and/or social worker to come up with an appropriate remedy and plan for your concerns, and the fact that you hadn't contacted or consulted with his previous teachers is unacceptable.

You have been a Special Education teacher in Anoka-Hennepin since 2002 and you have participated in numerous staff development opportunities and trainings. Your training and experience as a Special Education teacher should have led you to determine more appropriate ways to address your valid concerns about student SP's cleanliness.

To ensure you will meet district expectations, provide an acceptable standard of care and provide adequate supervision expected from you as a Special Education teacher, I direct you as follows:

1. Set up a weekly meeting with the paraeducators who work with the students on your caseload. This should be a minimum of 30 minutes outside of the student contact day. Each child's progress and program should be discussed and adjusted according to the feedback you receive. Administration must be notified of the meeting schedule.
2. Contact the appropriate support staff to assist in writing an appropriate plan to manage your concerns regarding SP's cleanliness.
3. Contact SP's foster mother and case worker to make certain they understand the plan and are in full agreement with it.

These directives specifically relate to your responsibilities with regard to providing an acceptable standard of care and adequate and appropriate supervision to our Special Education students and are not intended as a complete list of your duties and responsibilities as a teacher.

Failure to follow these directives will result in further corrective action, up to and including termination, pursuant to Minn. Stat., Section 122A.40.

On April 14, 2011, the Union brought a grievance alleging that the Employer did not have just cause to suspend the grievant or to issue the Letter of Deficiency to her and that, by taking those actions, the Employer violated Article IV, Section 10, of the parties' labor agreement. Parts of the grievance are set out below:

. . . Specifically [the grievant] denies engaging in any behaviors that resulted in a "failure to provide an acceptable standard of care and provide adequate and appropriate supervision" of any students in her care. She made a judgment call to try and clean up a student who appeared in her class with potential health concerns to himself and others, and she is being wrongly disciplined for using her professional judgment in this situation. [She] furthermore denies attempting to clip the student's nails, and denies knowingly or willfully injuring the student in any way.

Even if [the grievant's] conduct was properly the subject of discipline, the overly harsh punishment of a five day suspension without pay, given the lack of any previous disciplinary action taken against [her], makes this discipline without just cause because the "punishment" far exceeds the "crime" in this situation. . . .

Carlsen testified that on March 8, 2011, Theresa Cahalan, an Assistant Principal, received a telephone call from the foster mother of SP in which she told Cahalan that SP had come home with bruises on his thigh, that on the previous day, March 7, he had come home with a bloody finger and that on other days he came home with scratches and bruises. Carlsen, assisted by Cahalan and Sarah A. Kriewell, Director of Employee Services, began an investigation. Carlsen testified that the investigation included further interviews with SP's foster mother, discussions with the grievant, with three of her classroom Paras and with Jilene L. Coutant, the School Nurse.

The following is a summary of the testimony presented by the Employer about the investigation. Carlsen telephoned SP's foster mother on March 9. She told him that SP came home on Monday, February 28 with bruises, but that she did not complain. On March 1, she noticed a bruise on his arm. She told Carlsen that she talked to "someone at school" who said that they had been trying to cut his fingernails. She also told Carlsen that on March 7 when SP came off the school bus she

noticed that he had blood on his hands and that the bus driver told her that SP had been crying. She told Carlsen that, as she had told Cahalan, she had seen on March 8 that SP had bruises on his thigh. Carlsen testified that he asked SP's foster mother to come to the school on March 9 so that Carlsen could view SP's thigh. She did so and Carlsen saw that SP had one bruise on each thigh.

Carlsen asked Kriewell to interview the grievant and three of the grievant's Paras. Kriewell did so and took statements from each. I set out those statements below:

Statement of the grievant given March 10, 2011:

[SP] was picked up early on either 3/2 or 3/3/11 -- around 3:00 (he was not signed out even after a reminder for [his foster mother] to do so). It was on this day that [she] questioned his "bloody nose." It was actually red marker on his nose. I did mention to her that it was marker -- not a bloody nose before she even noticed or said anything as another staff in the building had commented on it prior to his dismissal and I wanted to make sure she knew it was only a mark from a marker -- she was on her cell phone at the time when picking him up. I had attempted to wash it off [SP's] face but he is resistant to having his face washed so I did the best I could.

Bruise on his arm that [she] questioned could have been caused by myself or a Para holding him while trying to trim his finger nails on 2/25/11. Finger nails were very long and very dirty. One finger nail got cut close and I made note of it in [SP's] communication book on the day it happened. [SP] is very resistant to any nail care and it took myself and 2 Paras to do his nails.

Scratches on his chest I never saw and unknown how he would have received any scratches on his chest at school. When [the foster mother] called and spoke with me I responded with the above response. The call was the day after the "bloody nose" -- either 3/3 or 3/4/11. These were the only concerns she had.

Monday, 3/7/11 [SP] did go home with a bloody knuckle. Unsure how he received the scratch. Did not notice the

knuckle until 3:45 ish when waiting in the East wing for the bell to ring. [SP] was resistant to going to class and chose to sit in flex area but was very persistent in going out the wing door to buses. This is not the door we use so therefore I was preventing him from going that way -- blocking him with my body -- not holding him or making him move in any way by my hands on him -- he is too big of a boy to attempt to pick him up and move. -- was offered help by a Para and another [Special Education] teacher and told them I was waiting him out -- that he was too big to move. If [SP] had been cooperative I would have had him walk back to my classroom, wash his knuckle and apply a band-aid and written a note in his communication book.

On 3/7/11 -- 2 Paras and I attempted to clean his finger nails with a nail brush. We did not notice any scratches right after the nail cleaning and were more careful with nails after the possible bruise he may have received on 2/25/11 from nail care. Again, [SP] does not like any nail care or hygiene care and is resistant to it.

Dirt and most likely fecal matter, due to the fact he puts his hands in his pants and has been known to pull feces out of his pull-up, were under nails and some is still under some nails as we were not able to get them completely clean.

I have told my Paras several times do not try to pick [SP] up when he goes to the floor. Wait him out. Give the visual cues. He is too heavy to attempt to lift or escort when resistant to moving and possible injuries to him or staff could occur at these times.

Statement of Para Pamela Winkelmann given March 10, 2011:

On Friday, February 25, 2011, [the grievant] asked [Para Penny Wolters] and me to help her clean the black dirt and clip [SP's] fingernails. The appearance of his nails were long and having a lot of black dirt under the nails. During this process, two of us had to hold [SP] down while the other would try to clean the black dirt and clip his nails. This process was very difficult as [SP] fought us the entire time. One of his nails did get clipped a little short and bled a small amount. The reason for this was due to [SP] jerking his hand/arm away while we were trying to clip his nails. At the time the clippers were squeezed, his jerking motion was forward (into the clipper) causing the short clip.

On Monday, March 7, 2011, [SP's] fingernails were once again looking very bad with black dirt under the nails. [The grievant] asked us [Para Anna Kvamme and I] to help with her so that we could clean the black dirt under his nails. [The grievant] held [SP] from behind (he was

sitting in a chair) while I held his hand and wrist. Anna tried to clean the dirt from under his nails. Again, during this process, [SP] fought us the entire time. This time, he got so upset that he made himself throw up a few times.

There are times when [SP] sits down and will not move when he needs to go, is asked to do something, or any other time requiring him to stand up. When this happens, it takes two of us to go under each arm (one under the left arm and the other under the right arm) to help him stand up and then escort him to wherever he needs to go. [SP] is a good kid, but has his moments when he doesn't want to do what is needed or asked of him.

Statement of Para Anna Kvamme given March 10, 2011:

I can totally agree with [the grievant] that we shouldn't have to be exposed to such filth and bacteria and that cleaning [SP's] nails/keeping them trimmed needs to be done. If [the foster mother] is not able to care for his personal hygiene needs on her own, maybe she needs to get a PCA for him. That being said, the way that we went about cleaning his nails was maybe not the best. It is possible that he acquired a bruise from how [she] was holding him. He fought us the whole time, and even vomited multiple times. Pam and I were instructed to keep going.

Statement of Para Penny Wolters given March 10, 2011:

On February 25th, I helped [the grievant] clip [SP's] nails. They were very long and sharp. They also were very dirty under his nails. It was a struggle to trim them. [She] trimmed while another Para and I held him. While I felt uncomfortable assisting, I know they needed to be clipped. He picks his nose, he digs in his diaper, so it is necessary to have them clipped and clean for our safety sake. When we get scratched and get an open sore, it isn't healthy. [SP] will drop to the floor and also will take off from us. He also scratches his skin. I did not notice any bruise or scratches except one on his hands.

Below, I summarize the testimony presented by the Union and the Employer about the treatment of SP that led to the grievant's discipline. The Employer presented the testimony of the three Paras whose written statements are set out above, Winkelmann, Kvamme, and Wolters, and the Union presented that of the grievant and Coutant, the School Nurse at Oxbow.

The first day SP was a student in the grievant's classroom was Tuesday, February 15, 2011. She met him on the previous Friday, February 11, 2011, when his foster mother brought him to school. The grievant reviewed his existing IEP and saw that it was current. It noted that he was resistant to hand washing and nail care, but the IEP did not indicate procedures that should be used when providing such hygienic care. On February 15, SP's first day in her classroom, she noticed that his fingernails were long and had black material under them. She thought that the condition of his nails presented a health risk to him, to other students and to her staff. She believed that it was important to clean his nails to prevent infection. She decided to take SP to the school's Health Office, where the grievant, with the assistance of Cheryl Nevison, a Health Paraprofessional, cleaned and trimmed his nails. Coutant, the School Nurse, was also present and may also have participated.

The grievant testified that she thought she had documented the cleaning and trimming of SP's nails in his "communication book" -- writings used by Special Education Teachers to send and receive written messages to and from the parents of special education students. She also testified, however, that she did not have a copy of that communication, and she explained that SP's foster mother did not always send back communications sent to her. The grievant did not notify school administrators that she had taken steps to have SP's nails cleaned and trimmed. She testified that it is a normal task for Special Education teachers to provide nail care to DCD

students. The grievant and Coutant testified that the Employer did not require such notification.

Coutant testified that, on February 15, she and the grievant discussed how to provide nail care to SP in the future. They concluded that it would be better to have the care done in the grievant's classroom by the special education staff because SP might be less resistant if the care was done in a familiar place by people he knew. Coutant testified that Special Education Teachers routinely provide hygienic care to students, washing and diapering them as needed. She knew of no policy of the Employer that prohibited such care, though she also testified that the Employer's policy limits the use of restraint.

On Friday, February 25, the grievant was aware from talking to SP's foster mother that the material under his nails contained feces deposited when he dug his fingers into his diaper. The grievant had tried to have him engage in water play as a means of keeping the nails clean, but she decided that his nails should be cleaned and trimmed again, and she and two Paras, Winkelmann and Wolters, did so in the classroom. The accounts given in the written statements of the grievant, Winkelmann and Wolters are consistent with their testimony -- including their statements that one of SP's fingers was scratched as his nails were trimmed.

The grievant testified that on March 7 she and two Paras, Kvamme and Wolters, tried to clean SP's fingernails, which were very long and dirty. The grievant held his body from behind,

as one Para held his hands still and the other cleaned each fingernail. It took about fifteen minutes to complete the task. SP was resistant again, and he vomited several times -- something that had not occurred before. The grievant characterized this as "behavioral vomiting," something that DCD students may do intentionally to show resistance and which, because it does not indicate illness, should be ignored to avoid reinforcement.

The Employer also presented the testimony of Cherie A. Peterson, Assistant Director for Special Education for the District. Peterson testified that she is licensed as a Special Education Teacher and Director and that her licensure includes the teaching of DCD students. She directs the Special Education staff in the schools throughout the District. Peterson testified as follows. Carlsen and Kriewell described to her how the grievant had provided nail care to SP. She was "very surprised" that the grievant had applied restraint to SP during the nail cleaning process on February 25 and March 7. Peterson agreed that the cleaning and trimming of SP's nails was necessary, but she thought that the grievant should have continued to take him to the Nurse's office for that service, as she had done on February 15. In addition, Peterson testified that, as SP's new Case Manager, the grievant should have obtained the advice of his IEP Team before she determined without that advice to use restraint during the process of caring for his nails.

Peterson also testified that the grievant, as a Special Education Teacher, is subject to the requirements of Minnesota

Rule 3535.2900, Subpart 5(A) (hereafter, the "Rule"), which establishes policies governing Behavioral Intervention with respect to Special Education students. Peterson testified that on March 7 the grievant's placement of her arms around SP to prevent him from moving away from the table where two Paras cleaned his nails and her direction to the Paras that they should hold his hands as they cleaned his nails were acts of restraint subject to the Behavioral Intervention policy set by the Rule. As such, the grievant should have recognized SP's need for nail care as a matter requiring "Conditional Behavioral Intervention," which, under the Rule requires his IEP Team to determine appropriate intervention procedures.

In addition, Peterson testified that, though it may be acceptable to ignore intentional vomiting -- done only to show resistance to care -- the grievant should not have ignored SP's vomiting in this case because he was resisting restraint. Peterson also testified that, if the grievant had convened an IEP Team meeting, it could have found other means to resolve the nail care problem -- calling SP's foster mother or having the nail care provided by the School Nurse. Peterson testified that the grievant had previously been made aware of these requirements in the periodic training that the District provides to Special Education Teachers.

On cross-examination, Peterson conceded that the grievant did not intend her actions in providing nail care to SP as punishment, but Peterson thought that, nevertheless, SP perceived her actions as punishment.

On March 9, 2011, Cahalan sent an email to Coutant and to the grievant and her Para staff in which she instructed them that, if SP's nails needed care in the future, it should be done by Coutant and her staff in the Nurse's office. The grievant testified that she complied with that directive and that, as I note below, SP's IEP Team established a different procedure on March 28, 2011. The grievant has also complied with all of the directives that were included in the Letter of Deficiency of April 8, 2011.

The grievant convened an IEP Team meeting for SP that was held on March 28, 2011. The IEP Team developed the following plan for providing nail care to SP. If SP's nails appear to need care, the grievant will have the care provided by Coutant and her staff or the grievant will telephone his foster mother, who will provide that care, either by coming to school to do so or by taking him home to do so. The grievant testified that, since this plan has been in place, SP's nails have been kept short and clean.

The grievant also gave the following testimony regarding the disciplinary penalty imposed by the Employer. She has not been previously disciplined. She thought that the IEP that SP had in place from the Minneapolis school district was adequate to meet his needs. She had never been instructed that she must take a student needing hygienic care to the Nurse's office for such care, though she did so on February 15, 2011. When Coutant, the School's Nurse, told her that SP would be more comfortable receiving nail care in her classroom, she accepted

that advice. When, on March 7, she and the two Paras provided nail care to SP, she did not consider the way in which he was held as he received that care to be a prohibited restraint. She testified that the loss of five days' pay was severe and that her intention had been to provide a benefit to SP, not to punish him. She continues to be SP's Special Education Case Manager and his Teacher.

In compliance with the Minnesota Maltreatment of Minors Act, Minn. Stat. 626.556, et seq., Carlsen notified the Minnesota Department of Education ("MDE") of the allegations made against the grievant. On October 5, 2011, the MDE issued two letters of Determination with respect to the allegations -- one to the Employer and one to the grievant. The two letters reach substantially the same conclusion, but the letter to the grievant includes more detailed fact statements. Below, I set out parts of the Determination letter issued to the Employer:

. . . It is the determination of the [MDE] that there is not a preponderance of the evidence to conclude that the teacher was responsible for maltreatment of the Student, for the following reasons:

. . . The origin of the bruises [one on his left thigh about 2 inches by 2 inches and a smaller mark on his right thigh] cannot be determined based on the information obtained. The bruise mark seen on the Student's left thigh might possibly have been received by accident when the Student stood up and attempted to stand up while seated at the table as described by the people involved in the fingernail cleaning incident.

. . . There is no evidence that the teacher or the paraprofessionals held the Student by the legs during this incident, and all three stated that none of them held the Student's legs during the incident.

. . . While the origin of the bruises cannot be determined, the possibility exists that the bruising occurred by accident during the March 7, 2011, fingernail cleaning incident. Therefore, there is not a preponderance of the evidence that maltreatment in the form of physical abuse occurred, and there is not a preponderance of the evidence that the teacher was responsible for maltreatment of the Student in the form of physical abuse.

As I have noted above, the MDE's Determination letter issued to the grievant reaches substantially the same conclusion as the one reached in the Determination letter issued to the Employer. The letter to the grievant, however, includes fact statements that are not included in the letter to the Employer:

. . . [During their interviews by an investigator for the MDE in July of 2011,] the teacher and both paraprofessionals stated that neither the two paraprofessionals nor the teacher held the Student by his legs at any time during the March 7, 2011, incident. All three consistently described the teacher as being behind the Student. The teacher was seated in a chair behind the Student who was also seated in a chair near the end of a rectangular table with one paraprofessional seated across the table from the Student, and one seated at the end of the table facing at an angle from the Student.

. . . [Paraprofessional 1] stated that she thought that the teacher held the Student by his shoulders, and [Paraprofessional 2] said she thought the teacher was holding the Student by the tops of his arms. The teacher stated that she did not hold the Student, but rather was "boxing" the Student in. The teacher said her hands were on the table, not on the Student. The teacher said she just kept the Student from moving away while they were trying to clean his fingernails.

The teacher and the paraprofessionals stated that the fingernail cleaning was attempted because it was a health issue for the Student and the staff. There was no mention of anyone doing any action in anger against the Student. The teacher said the process took a long time because the three of them tried to keep the Student calm, giving him time to calm down as they continued and after he vomited during the fingernail cleaning. The teacher stated that the paraprofessionals had talked very calmly to the Student, and one of them was even singing during this incident trying to keep him calm.

The MDE investigator interviewed the Student's prior teacher (PT) who taught the Student before he moved to [Oxbow]. PT stated that she also had trouble with the cleanliness of the Student's fingernails, and that she had received permission from the Student's biological mother to trim and clean his fingernails at school. PT said it took three people to clean the Student's fingernails, and they always did it while the Student was seated on the floor. She also stated that the Student had never vomited during her efforts at cleaning his fingernails.

#### DECISION

The parties agree that the issue presented is whether the Employer had just cause to issue the Letter of Deficiency to the grievant and to suspend her for five days without pay. The Union seeks the entire expungement of the Letter of Deficiency from the grievant's personnel file and the restoration to her of the pay she lost because of her suspension. The Union also seeks, if complete expungement of the Letter of Deficiency is not awarded, the deletion of parts of it that the Union argues are false and inaccurate.

Article IV, Section 10, of the labor agreement provides:

Teachers shall not be disciplined, reprimanded, reduced in rank or compensation without just cause. Whenever possible, the supervisor will discuss with the teacher those activities of the teacher which would normally lead to a written disciplinary action and shall offer suggestions for correction. . . .

The Union's primary argument is the following. The grievant was exercising her professional judgment when she determined the manner in which SP should receive nail care -- a process for which the Employer had not previously given direction to its Special Education staff. Her first judgment, on February 15 had been to take SP to the School Nurse's office for that care -- a method that received eventual approval by

Cahalan on March 8 and by the new IEP Team when it met on March 28. On February 15, Coutant advised the grievant that in the future she and her staff should provide SP's nail care in her classroom because Coutant believed he would be less resistant and more comfortable there, receiving care from people he knew in a familiar place. The Union argues that, in the absence of a particular policy prescribing the manner in which nail care should be provided, the grievant acted reasonably and professionally in first taking SP to the School Nurse and, thereafter, following the Nurse's advice. The Union argues that, because the grievant acted reasonably and professionally, the Employer lacked just cause to discipline her.

The Employer's primary argument is the following. From the grievant's training, she should have known that, under the Behavioral Intervention policies established by the Rule, she was not permitted to apply restraint to SP without first convening a new IEP Team meeting to obtain its direction. Even if, as the Union argues, the Employer did not have in place a policy that, in particular, directed Special Education staff how to provide nail care to a resistant student, the grievant should have known from her training with respect to Behavioral Intervention that she should have referred the matter to a new IEP Team meeting. The Employer urges that, because the grievant did not act in accord with policies she knew or should have known, the Employer had just cause to discipline her.

I reach the following conclusions, resolving these primary arguments of the parties. I agree with the Employer that, after February 15, when the grievant in the Nurse's Office

became aware of the extent to which SP became emotionally and physically resistant to nail care -- i.e., to the extent that it was necessary to hold him in order to provide that care -- she should have known from her training that the act of holding him could be considered a "restraint" covered by the Rule.

Though it seemed reasonable to follow Coutant's advice -- that she and her staff should provide the nail care in her classroom, the grievant should not have done so without direction from SP's IEP Team. On February 25, the grievant again encountered substantial resistance from SP as she trimmed and cleaned his fingernails. Again, from his resistance and the resultant need to hold him, the grievant should have recognized the need for an IEP Team meeting.

Accordingly, I rule that on March 7, when the grievant participated in and directed her staff to clean SP's nails, holding him still despite his continued resistance, her actions gave the Employer just cause to impose some discipline.

I rule, however, that the following facts should mitigate the discipline. As all witnesses agreed, SP's nails required cleaning and trimming. It is clear that the grievant's motivation was benign. Her intention was not to abuse or to punish SP, but to care for him by providing him a needed service. The grievant has no record of previous discipline. In these circumstances, i.e., in the absence of previous discipline and with no intention to abuse or harm SP, imposition of the first level of progressive discipline is appropriate. Accordingly, the award rescinds the grievant's five day suspension without pay, and it directs that the Letter of Deficiency, with

appropriate amendments, be considered a warning at the first level of progressive discipline.

The parties agree that the Letter of Deficiency is inaccurate insofar as it states that SP's fingernails were trimmed on March 7 (though it is clear from the evidence that they were trimmed on February 25). In addition, the Union objects to the use of the word, "forcibly," which appears twice in the Letter of Deficiency to describe the manner in which restraint was applied to SP. The Union considers the word too strong to be an accurate description of the nature of the restraint applied to SP. I rule that "forcibly" may not be an accurate one-word description of how restraint was applied to SP, insofar as it may imply to some an act of powerful restraint applied with an intention to harm. For that reason, the award directs that the Letter of Deficiency be amended to include this Decision and Award as a modifying supplement.

AWARD

The grievance is sustained in part. The Employer shall rescind the grievant's five-day suspension and restore to her the pay and benefits she lost because of it. The Letter of Deficiency, as modified by this Decision, shall be considered a warning at the first level of progressive discipline.

April 30, 2012

  
Thomas P. Gallagher, Arbitrator