

**OPINION AND AWARD**

**OF**

**DAVID S. PAULL**

**In the Matter of the Arbitration Between**

**INDEPENDENT SCHOOL DISTRICT No. 300  
(LaCrescent-Hokah School District), LaCrescent,  
Minnesota**

**AND**

**EDUCATION MINNESOTA (AFT, NEA, AFL-CIO)**

**(Proposed Discharge of Marianne F. Schultz)**

**Date Issued: August 8, 2012**

**Minnesota Bureau of Mediation Services File No. 12-TD-5**

# OPINION

## Preliminary Matters

The Arbitrator was selected by mutual agreement from a list provided by the Bureau of Mediation Services, State of Minnesota. A hearing was conducted in LaCrescent, Minnesota, on March 29, March 30, April 25 and May 7, 2012. Independent School District 300 (LaCrescent-Hokah School District) (District) was represented by Patricia A. Maloney, a lawyer with offices in Minneapolis, Minnesota. Education Minnesota (Union) was represented by Meg Luger-Nikolai. Ms. Luger-Nikolai maintains her offices in St. Paul, Minnesota.

At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. The proceedings were recorded by a court stenographer and a transcript was produced and distributed to the parties. After the witnesses were heard and the exhibits were presented, the parties agreed to present simultaneous final arguments in writing, postmarked on or before June 22, 2012. Thereafter, the parties requested and received a brief extension of time. The briefs were postmarked in a timely manner and the last brief was received on June 27, 2012. Thereafter, the case was deemed submitted and the record was closed.

Pursuant to *M.S. Section 122A.40, Subd 9*, the proceeding is governed by certain portions of the Uniform Arbitration Act, *Minn. Stat. §§ 572B.15 to 572B.28*, and the

collective bargaining agreement applicable to the teacher. *M.S. Section 122A.40, Subd. 15 ( c ) (2012)*. The collective bargaining agreement in force between the parties provides any decision by an arbitrator must be rendered within thirty days of the close of the hearing.

On July 27, 2012, the undersigned contacted the parties and indicated a need for more time to complete the award. Both parties agreed to extend the due date for a reasonable time, an action for which, given the length of the hearing and arguments, the undersigned is indeed grateful.

## **Issue**

The parties agree on a statement of the issue in dispute:

Did the District propose to terminate the employment of Marianne F. Schultz on December 21, 2011, in compliance with the law, and if not, what is the appropriate remedy?

Neither party has raised an issue of procedural arbitrability.

## RELEVANT STATUTORY LANGUAGE

Minn. Stat. §122A.40:

Subd. 9. Grounds for termination. A continuing contract may be terminated, effective at the close of the school year, upon any of the following grounds:

(a) Inefficiency;

(b) Neglect of duty, or persistent violation of school laws, rules, regulations, or directives;

(c) Conduct unbecoming a teacher which materially impairs the teacher's educational effectiveness;

(d) Other good and sufficient grounds rendering the teacher unfit to perform the teacher's duties.

A contract must not be terminated upon one of the grounds specified in clause (a), (b), (c), or (d), unless the teacher fails to correct the deficiency after being given written notice of the specific items of complaint and reasonable time within which to remedy them.

Subd. 13. Immediate discharge. (a) Except as otherwise provided in paragraph (b), a board may discharge a continuing-contract teacher, effective immediately, upon any of the following grounds:

(1) immoral conduct, insubordination, or conviction of a felony;

(2) conduct unbecoming a teacher which requires the immediate removal of the teacher from classroom or other duties;

(3) failure without justifiable cause to teach without first securing the written release of the school board;

(4) gross inefficiency which the teacher has failed to correct

after reasonable written notice;

(5) willful neglect of duty; or

(6) continuing physical or mental disability subsequent to a 12 months leave of absence and inability to qualify for reinstatement in accordance with subdivision 12.

Subd. 15. Hearing and determination by arbitrator. A teacher whose termination is proposed under subdivision 7 on grounds specified in subdivision 9, or whose discharge is proposed under subdivision 13, may elect a hearing before an arbitrator instead of the school board. The hearing is governed by this subdivision.

(c) The arbitrator shall determine, by a preponderance of the evidence, whether the grounds for termination or discharge specified in subdivision 9 or 13 exist to support the proposed termination or discharge. A lesser penalty than termination or discharge may be imposed by the arbitrator only to the extent that either party proposes such lesser penalty in the proceeding. In making the determination, the arbitration proceeding is governed by sections 572.11 to 572.17 and by the collective bargaining agreement applicable to the teacher.

## SUMMARY OF FACTS

### The Parties

The District is a political subdivision of the state of Minnesota located in LaCrescent, Minnesota. Because neither LaCrescent nor Hokah are first class cities as defined by Minnesota law, the District is governed by *M.S. Section 122A.40*. Approximately 1300 students attend District classes from early childhood through high school. The District operates six schools, including an early childhood center, an elementary school, a middle school, a high school and an alternative learning center for students who have not been successful in other public education settings. Most pertinent to this proceeding, the District provides special education classes for children who are autistic or who are significantly cognitively delayed.

The District is also a member of the Hiawatha Valley Educating District (HVED), an education district organized pursuant to *M.S. 123A.15*. HVED provides special education services to the District. The District and the Union are signatory to a collective bargaining agreement (CBA) which, subject to the requirements of the law, sets out the terms and conditions of employment for licensed teachers.

Ms. Schultz has been employed as a licensed teacher in the State of Minnesota for approximately 17 years. She is licensed in Physical Education, Health, Coaching and Special Education. Her Special Education qualifications qualify her to teach students who range from mild and moderately impaired to the severe and profoundly impaired. For the 2011-12 school year, Ms. Schultz was assigned to work as the teacher of elementary school students ages 5 – 10 with developmental cognitive disabilities (DCD).

This assignment required Ms. Schultz to work primarily in Room 109 (DCD Room) of the La Crescent-Hokah Elementary School. The children assigned to the DCD Room are among the most vulnerable students in the District. They all suffer from serious physical and/or mental disabilities. Several are non-verbal.

### Ms. Schultz's Employment History

#### *Training*

Ms. Schulz began her career as a teacher working for the Caledonia (Minnesota) School District. For the last 15 years, she has been employed continuously as a teacher by the District. In the 2010-11 school year, Ms. Schultz taught in middle school. However, other than that assignment, her career has been focused on teaching developmentally and/or cognitively delayed students. At the time of the events which resulted in this proceeding, Ms. Schultz was working with students in from 1<sup>st</sup> to 4<sup>th</sup> grade. Some of the students she worked with were children with whom she had worked for several years in a row, a circumstance which is not uncommon for special education teachers. The record shows that Ms. Schultz is specifically experienced in teaching students with such conditions as autism, traumatic brain injuries, profound cognitive and developmental delays, as well as other similar mental and physical impairments.

In addition to the required educational degrees, Ms. Schultz is certified in First Aid including cardio-pulmonary resuscitation (CPR), Autism Diagnostic Observation Schedules (ADOS), Applied Behavioral Analysis, American Sign Language, the Picture Exchange Communication system and Crisis Prevention Intervention (CPI). She has received occupational training to better help students whose disabilities make it difficult

for them to hold writing utensils. Ms. Schultz has trained other teachers, presenting for HVED and the Western Wisconsin Technical School.

ADOS is a discipline which assists education professionals in the identification of students who exhibit autistic symptoms. Applied Behavioral Analysis helps special education teachers recognize the causes for problematic behavior and provide ideas on how to deal with challenging conduct.

Ms. Schultz is supported in the resource room by assistants called “para-educators.” Ms. Schultz acts as the supervisor of the para-educators. The duties of the para-educators typically revolve around the needs of a single student. Many students in the DCD Room require constant attention, assistance and supervision. The record indicates that it is not unusual for DCD Room students to be disruptive, uncooperative and manipulative during class, sometimes trying to avoid completing the educational tasks assigned.

#### *Disciplinary and Work Performance History*

Prior to the events which gave rise to this proceeding, Ms. Schultz had never received any discipline relating to her interactions with or treatment of students. Ms. Schultz has been disciplined on two prior occasions.

Ms. Schultz received a non-written warning for conducting private business at school, selling commercial merchandise at school while using school resources. In a conversation occurring on March 30, 2010, Principal Julie Beddow-Schubert brought this activity to Ms. Schultz’s attention and directed her to stop. She did not impose more serious discipline. At the time, Ms. Beddow-Schubert was aware that several other

District employees had engaged in similar activity and, due to this circumstance, did not believe that more serious discipline was appropriate. The notes prepared by Ms. Beddow-Schubert indicate that Ms. Schultz denied using the District's internet network "for her business."

At the hearing, Ms. Schultz was asked whether or not she "conducted any of your EBay business at the school." Ms. Schultz replied "I would say that, no, I did not conduct my EBay business at school." She was then asked whether she had ever used the District's "internet service to conduct your e-mail business?" Ms. Schultz referred to a friend for whom she may have advertised some shirts using the school system, but was "not sure . . . I mean I guess I didn't." The record contains several examples of emails sent by Ms. Schulz from a District computer relating to her EBay business. One of these emails, dated February 18, 2010, advertised certain items Ms. Schultz had for sale and was addressed to a group of school personnel, including Ms. Beddow-Schubert.

On June 2, 2010, Ms. Schultz was issued a written reprimand for (1) releasing private educational data about a student to an individual who did not have the right to access that information and (2) failing to follow the procedures which regulate the identification of a student with significant disabilities. Ms. Schultz had been asked by an HVED administrator for a preliminary recommendation about the staffing needs of a student. Rather than send the email to the administrator, she hit the "reply all" button, sending the message to unauthorized persons. Subsequently, Ms. Schultz sent the child's mother a letter of apology, confirming that her actions violated the family's privacy rights.

Several of Ms. Schultz performance evaluations are in evidence. They appear to be generally satisfactory. The District utilizes Minnesota's "Quality Compensation Program, which requires teachers to complete certain tasks in order to obtain additional compensation. There is evidence that Ms. Schultz completed the requirements necessary to obtain the compensation available through the program.

*Ms. Schultz's Medical History*

In the winter of 2010, carpal tunnel surgery was performed on Ms. Schultz's left hand. Previous to this, a similar surgery was also completed on her right hand.

The record further establishes that Ms. Schultz had breast reduction surgery in order to relieve pain in her back and right shoulder. The record is not clear as to when the breast reduction surgery or the procedure conducted on her right hand occurred. Ms. Schultz testified that the recovery time for the carpal tunnel surgery would be approximately one year. She testified that her strength was limited and that she was unable to lift or 30 or 40 pound student by one hand. No expert testimony was introduced to evaluate the ability of Ms. Schultz to lift in September of 2011.

Events of September 20, 2011 – Student A

Student A was one of the special needs students assigned to the DCD Room on September 20, 2011. This student was a non-verbal 5 year old kindergarten student. The record describes him as small for his age. An exhibit in evidence states that on July 18, 2011, Student A weighed 40 pounds. Although the record described Student A as

generally non-aggressive, he would spit at people on occasion. Additionally, he would frequently crawl around the room on all fours, pretending to be a dog.

At about 12:30 PM, Deborah A. Clarkin, a para-educator in the DCD Room, returned after working on laundry for a student. At the time of her return, Ms. Clarkin noted that Ms. Schultz was working with Student A with a matching puzzle game on a carpeted area of the floor. Student A was not paying attention to Ms. Schulz. He slowly got up on all fours and began to crawl away. Ms. Schultz descended on one knee and one foot. She grabbed Student A's ankle from underneath and, as she stood up, yanked him upward. Student A's face hit the carpet, with his nose pointed directly down. His legs were slightly bent and were up in the air. Holding on to the child in this way, Ms. Schultz walked three or four feet, dragging Student A in the direction of the spot at which they had previously been working. Student A put both of his hands up and turned his head to the side of the carpet. When they reached the puzzle, Ms. Schultz released his ankle and he dropped to the floor. Student A immediately sat up. His legs were fanned out and he rubbed the side of his face. Ms. Clarkin testified that, based on her observations, Ms. Schultz displayed anger toward Student A. Ms. Schultz stated "This kid drives me crazy."

Ms. Clarkin suspected that the conduct she had observed constituted maltreatment within the meaning of the Minnesota Maltreatment Reporting Law, *M.S. Section 626.556*. As a para-educator, she had been advised by the District at the beginning of the school year that she had a responsibility to report suspected violations of this law. The next day, she reported her observations to Ms. Beddow-Schubert.

Through an email, Ms. Beddow-Schubert asked Ms. Clarkin to commit the details of her observations in writing and she complied. However, she did not comply immediately after the email was sent. Because she was a new employee, Ms. Clarkin did not have regular access to the District email system and did not receive the message on the day it was sent. Several days later, she was personally contacted by Ms. Beddow-Schubert's secretary and informed of the email and its contents. Ms. Clarkin's statement was completed and submitted to Ms. Beddow-Schubert on September 26, 2011.

Thereafter, Ms. Beddow-Schubert asked Deb Best, the school nurse, to examine Student A for signs of injury. Two examinations took place, the first on September 23 and the second on September 27. These examinations did not show that Student A displayed any physical signs of the incident. Ms. Best did observe an abrasion near Student A's left eye and faint bruises on his lower legs. However, both of these conditions were consistent with a previously reported injury that was unrelated to the incident reported by Ms. Clarkin.

Ms. Schultz denied the entire incident. But both Ms. Schulz and the Union agreed that, assuming the incident transpired as testified to by Ms. Clarkin, the grabbing of a student by the ankle and jerking him upward so his face hit the ground, would constitute a violation of *M.S. 626.556* and the CPI procedures.

Ms. Beddow-Schubert also reported the matter to Houston County Social Services. That agency forwarded the matter to the LaCrescent Police Department (Department) for investigation. The Department contacted the Minnesota Department of Education (MDE), the agency responsible for investigating reports of child mistreatment pursuant to *M.S. 626.556, Subd. 3b*. MDE and the LaCrescent Police coordinated an

investigation and the results were forwarded to the Houston County Attorney. In a report issued December 14, 2011, the Houston County Attorney issued a report determining that there was probable cause to believe that a crime had been committed. Ms. Schulz was thereafter charged with the crime of Malicious Punishment of a Child in violation of *M.S. 609.377, Subd. 1*, a gross misdemeanor.

#### Events of September 26, 2011 – Student A

On the morning of September 26, 2011, para-educator Katherine M. Grimm was in the DCD Room, sitting at a table writing in the notebook of a student. She heard Ms. Schultz direct Student A to sit down “three to four times.” Thereafter, without making eye contact with Ms. Schultz, Ms. Grimm observed Student A sitting “close to the table . . . very close” Ms. Grimm further observed Ms. Schultz place her left arm around Student A and her right arm “towards his left side,” with her left leg behind the chair. She then heard Ms. Schultz states that “This is not proper CPI,” or “This is not a proper restraint,” or something to that effect.” Immediately thereafter, Ms. Grimm testified that she was “sure” that Ms. Schultz said “This is not a proper restraint.”

Student A seemed “stressed” to Ms. Grimm. “He was trying to push back and he was saying ‘Let me go, let me go.’”

At the end of the school day, Ms. Grimm reported what she had observed to Ms. Beddow-Schubert. She was asked to place her observations in writing. Her statement was dated on the day of the observation.

### Events of September 26, 2011 – Student B

Student B was described in the record as a short, stocky fourth grader with glasses and an IQ of 58. He suffers from a congenital heart disease and uses an inhaler. At the time of the incident, Ms. Schultz had worked with Student B for approximately three years.

Student B's Individual Health Plan specified the following restrictions and instructions:

Can participate in all activities including physical education class at school . . . Monitor [Student B's] respirations and color status, especially during physically active times. If [Student B] becomes short of breath, has continuous cough, or experiences a color change – either increased blueness around the mouth, nose, or a darker than normal skin color, remove him from the activity and have him rest quietly. If shortness of breath or wheezing continues, contact the school nurse . . . so she can access respiratory/oxygen status and provide treatment if needed.

In compliance with this directive, the staff and been instructed to watch Student B very closely. If he became too anxious or excited and turned blue, the staff would be obligated to place him in a calmer atmosphere and allowed to rest.

Compliance with this plan was the responsibility of Ms. Schultz. The para-educating personal did not have the authority to remove Student B from a stressful environment.

On this particular day, Student B was wearing a heart monitor device. Para-educator Susan M. Craig, who was present in the DCD Room on that day, described Student B as “very fidgety . . . he takes the pencil, you know, banging it on the edge of the table.”

At around 1:15 PM, upon reaching the DCD Room, Ms. Clarkin observed Student B standing near a small plastic chair. She heard Ms. Schultz instruct him to sit down. Her hands were on Student B's shoulders. Ms. Clarkin then observed Ms. Schultz push Student B into the chair. When he entered the chair, Student B fell backwards. The front legs of the chair lifted up off the floor so that Student B's feet were up. The chair then returned to its former position on the floor and Student B said "Whoa." She further observed that Student B's complexion was gray or "dusky" at the time he was pushed into the chair.

Ms. Clarkin reported the incident to Ms. Beddow-Schubert the next day. She completed a Houston County Mandated Child Abuse/Neglect Report Form and submitted it to the County. Based on her observations, Ms. Clarkin believed that Ms. Schultz was angry with Student B.

The educational activity in which Ms. Schultz and Student B concerned the completion of a worksheet. Ms. Craig noted that, before the chair incident, Ms. Schultz was "gently" attempting to direct Student B's attention to the worksheet by placing her hands on his shoulders and using verbal cue to try to get him to focus. When he failed to cooperate, Ms. Schultz reminded him about a toy he had brought from home for use in an after school activity program known as ABLE (A Better Living Environment). The record showed that ABLE is considered a "fun" activity by the DCD Room students and a place they looked forward to attending.

Ms. Schultz told Student B that if he did not make an effort to complete the worksheet, she would keep the toy on her desk that night. Ms. Craig observed that, as the Ms. Schultz's efforts continued, Student B was breathing harder and becoming more

upset. At one point, Student B ripped up his math worksheet. In an effort to permit Student B to “de-escalate,” Ms. Craig tried to distract Ms. Schultz by handing her a folder relating to another student. However, Ms. Schultz continued to interaction with Student B.

Thereafter, Ms. Schultz stood up and told Student B that she was going to call his mother. Student B became more upset and yelled “No.” Ms. Craig observed that Student B was very red-faced at this time and that his breathing was labored. He became more upset when Ms. Schultz picked up the phone. While Ms. Schultz spoke with Student B’s mother on the phone, Ms. Craig engaged Student B, talking in a loud voice, hoping that he would not be able to hear what Ms. Schultz was saying to his mother.

At the request of Ms. Schultz, Ms. Craig then began to assist Student B to the phone. Ms. Craig asked Student B if he wanted to speak to his mother and he turned and ran back to the cubicle. Ms. Schultz directed Student B to speak to his mother. He continued to breathe heavily and began to cry. Ms. Schultz testified that Student B did speak to his mother. His mother, however, stated that Student B did not say anything to her and that she could hear him sobbing.

At about the time the phone call was terminated, Ms. Beddow-Schubert entered the room, looking for someone else. She observed that Student B was red-faced, was breathing heavily and had tears on his cheeks. Ms. Beddow-Schubert asked Ms. Craig if Student B was having a rough day. Ms. Craig replied something like “Oh, you could say that.”

After the phone call to Student B’s mother, Ms. Schulz announced that she intended to call ABLE. She advised Student B that his toy would stay with her for the

evening and that he was to take the worksheet with him to ABLE. She instructed him to complete the worksheet before engaging in any “fun” activities at ABLE.

Later in the afternoon, Ms. Grimm heard Student B crying to three to five minutes in the DCD Room. Ms. Grimm was alarmed because she had never heard Student B cry at school and because he appeared to be very upset. Ms. Grimm recalled that the School Nurse had advised her and the other para-educators that whenever Student B was engaged in an activity that caused him to exhibit symptoms of his medical condition that the activity should be discontinued and Student B should be allowed to calm down. Because Ms. Schultz did not discontinue the activity, Ms. Grimm became very concerned. Ms. Grimm, who was due somewhere else at the time, delayed her departure until another adult was present. She did not leave the DCD Room until Ms. Craig arrived.

Student B’s mother was concerned when he arrived home that afternoon. She observed that his color was dark and his lips were a little blue. She transported her son to the hospital. He was admitted due to low oxygen levels and was hospitalized for the next two days.

#### Child Restraint Rule

The parties agree that Minnesota law authorizes teachers to physically hold student only if there is an emergency. The law prohibits any physical intervention intended to hold a child immobile or limit the child’s movement through the exclusive use of body contact. Emergencies occur under the law where immediate intervention is

needed to protect the student or other individual from physical injury or to prevent serious property damage.

CPI also limits the use of physical holds to situations that meet the definition of an “emergency.” The District specifically requires all of its special education professionals to learn, implement and comply with CPI (Crisis Prevention and Intervention program).

The CPI program helps to provide special education teachers with specific tools to minimize and replace the need for physical restraint. Specifically, the CPI program promotes the use of various verbal techniques to deescalate a student’s behavior when they are difficult to control, but not in an emergency setting. CPI is based on the premise that avoiding physical restraints is always preferred. When a child is restricted in an effort to control behavior, CPI teaches, distress is the probable result and the distress caused when a child is restrained does not produce an atmosphere in which learning occurs.

Ms. Ruth-Polachek, a behavior interventionist for HVED, testified that it can be “upsetting for children to be held . . . traumatic sometimes for children to be restrained.” When faced with problematic behavior, Ms. Ruth-Polachek testified, the policy requires teachers to “take off your teacher hat, put on your therapeutic counseling hat, because right now you’re not teaching academics . . . Your job is to be a therapeutic support and calm that child down so they can return to learning.”

### Disciplinary Procedures

By letter dated December 21, 2011, the District notified Ms. Schultz of its action proposing her immediate discharge. The letter listed the statutory grounds for the action, including “immoral conduct . . . conduct unbecoming a teacher which requires your immediate removal from the classroom and other duties . . . willful neglect of duty.”

The letter further specified the conduct which formed the basis for the decision, including the incidents in which Student A was lifted by the ankle on September 20, 2011, the restraint of Student A on September 26, 2011, and the failure to comply with Student B’s individual health plan.

The letter failed to refer to an improper restraint of Student B on September 26, 2011.

The District’s letter also advised Ms. Schultz that “You are hereby suspended with pay effective immediately until a final decision is made on your proposed discharge.”

## **Positions of the Parties**

### The District

The District begins its statement of position by noting that the three grounds it has alleged in support of the discharge – “immoral conduct, conduct unbecoming a teacher and willful neglect of duty,” are consistent with *M.S. Section 122A.40*. The District cites precedent for the proposition that “Only one of the statutory grounds must be proven to sustain an immediate discharge.” A “preponderance of the evidence,” the District asserts, is sufficient to establish whether any of the statutory grounds exist.

Since neither the statute nor the courts have defined the operative terms, the District suggests that the “plain meaning” of the words must be utilized. The District cites to an unabridged dictionary and a legal dictionary to supply working definitions of these terms. The District asserts that “dragging a 5 year old child” constitutes “immoral conduct” by any definition.

The District also argues that “by giving teachers the right to choose arbitration, the Legislature must have intended that arbitrators could substitute a ‘just cause’ standard for the statutory grounds for discharge.” In this regard, the District refers to the Houston County Attorney, who has charged that this very conduct constitutes the “malicious punishment of a child” under state criminal law. The District contends that any conduct that constitutes a crime is sufficient to justify a discharge.

The District takes the position that, since it has proven that the “dragging” occurred, just cause to support its decision exists. “Certainly,” the District maintains, “a

school district cannot be expected to retain teachers on the staff who have behaved towards students in a criminal manner at school.”

The District also takes the position that the other allegations of student mistreatment warrant discharge. The District “concedes” that it cannot prove that Student B’s low level of oxygen and subsequent hospitalization on September 26 were caused by Ms. Schulz conduct. What is clear, according to the District, is that Ms. Schulz failed to follow appropriate CPI procedures and did not provide an environment in which Student B could “rest quietly” when he began to exhibit signs of stress. Student B, whose IQ is only 58, was crying and having difficulty breathing, the District argues. Rather than reduce the demands she had previously made on Student B, the District asserts, Ms. Schultz removed Student B’s toy, called his mother, insisted he complete the worksheet and sent the work to ABLE, his after school activity. Ms. Schultz, the District contends, “continued to add stressor after stressor” in this anxiety producing situation. Such conduct, the District insists, was immoral.

The other two incidents, the improper attempt to restrict the movement of Student A and the pushing of Student B back in his chair, may not be sufficient to terminate, the District admits. However, the District argues, these incidents demonstrate a “pattern” of physical aggressiveness toward these “handicapped students,” as well as “repeated violations of CPI procedures and the new restrictive procedures laws.”

The District takes the position that the proposed immediate discharge of Ms. Schultz must be sustained because the conduct was “not remediable” in contemplation of *M.S. 122A.40 Subd. 9*.

Reference is made to the four factors developed in case law to determine this question. The District argues that the “prior record” of Ms. Schultz supports immediate discharge because she did not accept responsibility for her actions and was not “truthful.”

Next, the District argues that the “severity” of Ms. Schultz’s conduct warrants immediate discharge. To the District, the fact that the “dragging” incident has become the basis for a criminal charge, when combined with Ms. Schultz’s failure to follow the health plan for Student B, calls for immediate discharge. The District refers to potentially “fatal consequences . . . conduct could have resulted in educational, physical, and/or psychological harm” to the students. “In this case,” the District contends, Ms. Schultz’s continued presence in the classroom “would endanger other students because the Teacher has repeatedly engaged in restrictive procedures contrary to law, through statements to staff, acknowledged that she knew she was doing so.”

The District asserts that Ms. Schultz’s conduct “presented both actual and threatened harm to students,” referring to the child whose head had hit the floor “as a result of an intentional act.”

Finally, the District contends that the conduct could not have been corrected with a warning. First, the District asserts, no warning was required, as “the District should not have to tell an experienced special education teacher not to drag an uncooperative student on the floor or not to continue to escalate pressure on and threats of punishments to a medically fragile student who is exhibit signs of stress.” The District further argues that the “willful nature” of Ms. Schultz’s conduct “shows that her conduct could not have been corrected.” Ms. Schultz may argue that if a lesser degree of discipline is imposed, she will not engage in similar conduct in the future. However, the District argues that

this position is belied by her repeated denial that she “engaged in any inappropriate conduct despite the testimony of several witnesses to the contrary.”

The District requests that the proposal to immediately discharge Ms. Schulz be upheld pursuant to *M.S. Section 122A.40, Subd. 13*.

### The Union

The discharge cannot be sustained, the Union generally contends, because Ms. Schulz did not engage in any misconduct.

Regarding Student A on September 20, 2011, the Union first suggests that the evidence offered by the District is “thoroughly lacking in credibility.” The testimony provided by Ms. Clarkin is not credible, the Union asserts, due to (1) her testimony with regard to how she entered the room was not consistent with her testimony regarding how she usually entered the room, (2) her inconsistent testimony relating to the manner in which she used the door, (3) the failure of anyone else to confirm her testimony, (4) she had the presence of mind to check the clock but not to physically intervene, (5) she didn’t discuss the details of what happened with anyone, (6) she did not document the incident or attempt to preserve evidence and (7) her account was disputed by Ms. Haffner and Ms. Grimm. The Union finds it to be “unbelievable” that Ms. Grimm and Ms. Haffner could not corroborate Ms. Clarkin, including the statements “This kid drives me crazy.”

The Union also questions the probity of what it terms to be the lack of “physical evidence” with regard to Student A. No marks were found on Student A, the Union asserts. No crying was heard by Ms. Haffner or Ms. Grimm. The Union argues that Ms.

Schultz is not physically capable of the disputed action, due to her medical problems including her bilateral carpal tunnel and breast reduction surgeries.

With regard to the allegation that Ms. Schultz improperly restrained Student B on September 26, 2011, the Union asserts that “It just didn’t happen . . . There is no credible evidence that Ms. Schultz’s supportive arm around Student B’s chair was a restraint . . . pushing a child’s chair in for the purpose of helping him gain proximity to the table does not violate state law.” The Union also takes the position that the evidence does not support this allegation.

The Union contends that the District’s failure to include a reference to the alleged improper restraint of Student B violates the requirement in *M.S. 122A.40* that all grounds for discharge be included in the letter of discharge with “reasonable detail.”

Ms. Clarkin’s testimony must be deemed “fabricated,” maintains the Union, because it was physically impossible for her to have seen Ms. Schultz’s interaction with Student B.

The Union also contends that Ms. Schultz’s actions were proper and were administered “with the permission of her principal.” Ms. Schultz’s actions on September 26, specifically her providing Student B with several “academic artifacts,” were consistent with the CPI techniques outlined by Ms. Polachek. The Union argues that, when Ms. Schultz advised that she had called Student B’s mother and was planning to call ABLE, Principal Beddow-Schubert she told her “that would be fine.”

There is no evidence to establish, the Union argues, that Ms. Schultz’s interaction with Student B precipitated “a health event later on September 26.” The Union cites to several points in support, including (1) Mr. Piche’s testimony that “Student B does get

over-exerted or worked up from time to time,” (2) Ms. Craig did not think to take Student B to the nurse, (3) not every instance in which Student B experienced color change was serious and (4) Student B was “physically fine.”

Even if Ms Schultz engaged in misconduct, the Union argues, no “terminable offense” has been established. All of Ms. Schultz’ conduct is “remediable,” according to the Union. Ms. Schultz has “no relevant prior disciplinary” history, states the Union. “The record reflects that when Ms. Schultz has made errors, and particularly when she has been given direction as to how to modify her behavior,” the Union argues, “she has complied with that direction.”

The Union rejects the argument that “extensive training in CPI techniques is evidence that [Ms. Schultz] cannot improve her performance.” Training does not “estop” an employee from being considered remedial, the Union suggests. Ms. Schulz’s interaction with Student B required the use of her professional judgment. Termination is not warranted, maintains the Union, just because the situation could have been analyzed differently.

The Union refers to the District’s evidence that any student suffered harm as “generic.” There is no evidence that Student A suffered either physical or emotional harm, the Union maintains. With regard to the emotional state of Student B, the Union asserts that “crying is not a terminable offense.” The Union contends that Student B “was known to engage in avoidance behaviors, and to manipulate . . . It is entirely possible that his tears . . . were part of an avoidance strategy on his part.”

There is no evidence that the hospitalization of Student B was causally related to his “work in his worksheet with Ms. Schultz,” the Union asserts. Student B goes to the

hospital “quite often,” argues the Union and Ms. Craig testified that she did not “take Student B to the nurse every time his color changed . . . None of the adults who interacted with Student B . . . felt that medical attention was warranted.” Further, the Union maintains, no attempt was made to determine whether or not Student B had incurred any mental harm. Crying, by itself, cannot support a *Kroll* factor, the Union argues.

The Union takes the position that violating rules and procedures is not a terminable offense within the District. Specifically, the Union contends that Ms. Clarkin was not disciplined despite discussing with her colleagues on several matters related to Ms. Schultz at a time that she was under a directive not to. Similarly, the Union contends that Ms. Clarkin was not disciplined for violated the Maltreatment of Minors Act, calling for immediate reports of the incident concerning Student A. Ms. Craig, the Union submits, failed to report “alleged Misconduct by Ms. Schultz for an entire month,” and was not disciplined. The Union further contends that Ms. Craig failed to properly supervise Student A, but received no discipline. The Union argues that the District’s action against Ms. Schultz is disproportionate and cites to cases ruling that unequal discipline is not appropriate.

Criminal charges are not a basis for termination, the Union contends. Just as criminal charges are not dispositive of whether an event occurred, the Union suggests, neither are they dispositive of “whether a termination should take place.” The Union points out that *M.S. Section 122A.40* provides that only “conviction of a felony” is sufficient to support termination. No Minnesota case law supports the proposition that criminal charges alone warrant dismissal, the Union adds.

To the extent there is an exception to the “conviction” rule when the teacher’s actions damage his or her “reputation in the community,” this records does not support such a finding, the Union asserts. The testimony of Ms. Von Arx and Ms. Czechowica is referred to in support of this position.

The Union maintains that all credibility disputes should be resolved in favor of Ms. Schultz. The only challenge to Ms. Schultz’s honesty, according to the Union, was by Ms. Beddow-Schubert, concerning the Ebay incident.

With regard to Ms. Clarkin, the Union takes the position that her testimony included “brand new” allegations and was “embellished” at the hearing. Specifically, the Union refers to incidents in which Ms. Clarkin’s testimony differed from other witnesses on certain subjects including whether Ms. Schultz used profanity, the structure of student assignments, the condition of Student A’s face after being alleged dragged and whether she notified others about the Student A incident. The Union also contends that Ms. Clarkin’s testimony was not credible due to certain other inconsistencies relating to what she discussed with colleagues.

The Union further suggests that Ms. Clarkin did not testify truthfully due to her dislike for Ms. Schultz. In support of this proposition, the Union refers to Ms. Clarkin’s testimony relating to the “behavioral strategies” employed by Ms. Schultz. The Union contends that on one occasion, Ms. Clarkin refused a directive given to her by Ms. Schultz. The Union refers to Ms. Clarkin’s testimony that Ms. Schultz had acted in a vindictive manner and that she feared retaliation.

In addition to its challenge to the testimony of Ms. Clarkin, the Union takes the position that the testimony of Ms. Grimm, Ms. Craig and Ms. Beddow-Schubert should

be questioned. In the case of Ms. Grimm, the Union suggests that statements made relating to the manner in which Ms. Schulz allegedly restrained Student A and the mental state of Student B were inconsistent. Ms. Grimm's account is also unbelievable, contends the Union, because she claims to have listened to Student B cry for at least three minutes and "did nothing."

In the case of Ms. Craig, the Union asserts, her "report of what happened is nowhere near contemporaneous, and her newly asserted concern for Student B is utterly at odds with her actions . . ."

The Union generally questions the testimony of Ms. Beddow-Schubert since she was responsible for the investigation and the results, which "bears squarely on her performance as a principal." Ms. Beddow-Schubert "just plain does not like Ms. Schultz," the Union asserts, and failed to document concerns allegedly made to her by Ms. Grimm, Ms. Craig or Ms. Clarkin. Ms. Beddow-Schubert "acknowledge that she didn't remember precisely what Ms. Schulz said, but that 'the essence' of Ms. Schultz's communication struck her as untruthful." Ms. Beddow-Schubert credited the recollections of the witnesses testifying against Ms. Schulz, despite their inconsistencies and other shortcomings. "Ms. Beddow is plainly not a reliable judge of Ms. Schultz's credibility," the Union asserts.

The Union concludes by taking the position that Ms. Schultz's record is "replete" with factors of mitigation. Noting that Ms. Schultz has been employed for 15 years, the Union refers to "good performance reviews by two different principals and her peer reviewer." The Union emphasizes that Ms. Schultz's compliance with state laws and District policies regarding restraints has never been an issue in the past.

Ms. Schultz has additionally “developed an exemplary record of service to her students,” according to the Union. Positive comments provided by Ms. Von Arx and Ms. Czechowicz are noted. The Union contends that Ms. Schultz has never reacted in anger, despite much provocation to do so. “As a long term teacher with only a reprimand in her personnel file, Ms. Schultz is entitled to demonstrate that she can respond to the concerns that the District has raised . . . is more than willing to respond . . .”

As to the “three paraeducators now accusing Ms. Schultz of misconduct,” the Union suggests no concerns were ever raised prior to September 20, 2011, and they are not licensed teachers. “The District adduced not a shred of evidence that could explain why a highly regarded teacher would, after fifteen years of exemplary practice in the District, behave in such an [improper] fashion.”

In conclusion, the Union asserts that the resolution of this dispute is fundamentally a question of credibility. The Union concedes that the testimony of Ms. Schulz is subject to the same criticism as Ms. Clarkin, but argues that the difference is testimony which is “rife with anecdotes populated by people who have . . . no idea what she could be referencing.”

Focusing on the issue of credibility, the Union concedes that the District’s dragging allegations associated with Student A, as well as the failure to comply with CPI techniques, would be a breach of Ms. Schultz’s obligations. “Ms. Schultz does not argue with the seriousness of the charges against her,” the Union states. However, she denies that these events ever occurred.

The Union takes a similar position with regard to the allegations surrounding Student B. “[B]arring a student’s movement, or restricting his egress, would be

inappropriate in the absence of an indication that such a restraint was necessary to safeguard the student,” the Union notes, “Ms. Schultz never did those things.” In this regard, the Union suggests that Ms. Grimm “may not be lying, but she did not see what she thought she saw.” Ms. Clarkin, the Union suggests, “could not possibly seen what she saw, because Student B was never in an area visible to her, much less in the place she said he was.”

*M.S. 122A.40* provides that discipline other than discharge may be awarded here, the Union notes, “only to the extent that either party proposes such lesser penalty in the proceedings.” The Union suggests that the conclusion is that misconduct occurred, “a short suspension and additional training is warranted, not termination.”

“The District was wrong to propose . . . termination [and] deprived its students of an excellent teacher for nearly a school year,” the Union maintains. Reinstatement is requested. In the alternative, if misconduct is determined, a suspension of appropriate length is suggested by the Union.

## **Explanation of the Award**

### Applicable Law and Evidentiary Standards

The parties are in accord with regard to what laws and standards apply. *M.S. Section 122A.40*, more popularly referred to as Minnesota’s Continuing Contract Law, applies to this case. The law provides for two forms of discharge. The first, as set forth in *M.S. 122A.40, Subd. 9*, authorizes the termination of a teacher at the end of the school year. This action is specifically conditioned on the requirement that the school district first provide “written notice of the specific items of complaint and a reasonable time within which to remedy them.”

In the present case, the District relies on the second form of prescribed statutory discharge, which is effective immediately after the alleged occurrence of one or more of the grounds specified in *Subdivision 13* of *M.S. 122A.40*. The District takes the position that the discharge of Ms. Schultz is justified on the basis of three statutory grounds listed in *M.S. 122A.40, Subd. 13*—immoral conduct [Subd. 13 (1)], conduct unbecoming a teacher requiring immediate removal [Subd. 13(2)] and willful neglect of duty [Subd. 13(5)]. An immediate discharge is sustainable upon the proof of at least one of the grounds set forth in *M.S. 122A.40, Subd. 13*.

*M.S. 122A.40, Subd. 15* provides that the teacher may contest a school board order for immediate discharge by demanding a hearing before the school board. In this case, Ms. Schultz has “elect[ed]” to contest her immediate discharge by means of an arbitration hearing, an alternative option pursuant to *M.S. 122A.40 (15)*. When this method of

resolution is selected, the law requires an arbitrator to determine whether grounds exist to support the proposed discharge “by a preponderance” or “greater weight” of the evidence. *See, Netzer v. Northern Pacific Rlwy Co.*, 57 N.W. 2d 247 (Minn. 1953).

In its brief, the District suggests that the terms “immoral” and “unbecoming” be defined by reference to *Webster’s New Universal Unabridged Dictionary (Webster’s)*. Webster’s defines “immoral” as “not in conformity with accepted principles of right and wrong . . . contrary to the moral code of the community.” The term “unbecoming” is defined in the volume cited by the District as “unsuitable or inappropriate.”

The District further suggests *Black’s Law Dictionary* 1630 (8<sup>th</sup> Ed. 2004) as a means of defining the term “willful.” *Black’s* defines the term “willful” as “voluntary, intentional, but not necessarily malicious.”

The two authorities cited by the District, *Webster’s* and *Black’s*, are both well established and accepted sources of information. The definitions of the operative terms, as defined by the sources, are acceptable for purposes of this dispute.

The parties are further in agreement that, assuming the conduct of Ms. Schultz occurred as alleged, there would be sufficient reason to conclude that Ms. Schultz failed to comply with *M.S. 122A.40, Subd. 13*. Consistent with this accord, the parties’ dispute does not raise the theoretical sufficiency of the allegations pursuant to *M.S. 122A.40, Subd. 13*. The dispute here is whether or not the conduct alleged actually occurred. The parties’ disagreement is essentially factual in nature.

Pursuant to statute, the findings of fact made in this award were considered only with regard to the “preponderance” evidentiary standard, and not to a more rigorous standard such as “reasonable doubt.”

## Existence of a Statutory Basis for Immediate Discharge

### *Student A – September 20, 2011*

A preponderance of the evidence presented establishes that, on September 20, 2011, at about 12:30 p.m., Ms. Schultz lifted Student A up by his ankles, causing his hands to go out from under him and his head to hit the floor. Thereafter, Ms. Schultz, still holding Student A by the ankles, carried him for approximately 3 or 4 feet with his face contacting the carpeted classroom floor. The evidence further supports the conclusion that Ms. Schultz displayed anger toward Student A at this time and said “This kid drives me crazy.”

These findings are sufficient to support the conclusion that on September 20, 2011, Ms. Schultz engaged in conduct listed in *M.S. 122A.40, Subd. 13 (1), (2) and (5)*.

The Union suggests that these conclusions are not warranted because Ms. Clarkin is not a credible witness and because all “physical evidence is to the contrary.” The record here compels that conclusion that Ms. Clarkin was a believable and credible witness. The reasons for this conclusion are provided in a separate section of this award.

With regard to the physical evidence, the proof on this point was sufficient to support the conclusion that Ms. Schultz improperly restrained Student A on September 20, 2011. There was physical evidence of the restraint. Ms. Clarkin credibly testified that she observed a “redness” on the face of Student A after the incident, a condition which lasted for a measureable period of time.

The Union further suggests that Ms. Schultz was physically incapable of lifting Student A. However, there is reliable evidence in the record to support the presumption

that Ms. Schultz was indeed both medically and physically capable of lifting Student A. Ms. Clarkin testified that she saw her do it. The evidence to support Ms. Schultz's contention, consisting only of her testimony, was not sufficiently convincing. There was no independent evidence offered concerning Ms. Schultz's health status. No medical testimony or medical records were offered to establish Ms. Schultz's physical medical capabilities to lift.

*Student A – September 26, 2011*

A preponderance of the evidence exists to establish that on September 26, 2011, Ms. Schultz restrained Student A with her leg behind his chair, placing her left arm around Student A and her right arm toward his left side while he was sitting close up against work station table. The evidence supports the conclusion that Ms. Schultz stated "This is not a proper restraint" and that Student A exclaimed "Let me go, let me go" as he tried to push back.

However, these findings are insufficient to support the conclusion that on September 26, 2011, Ms. Schultz conducted herself in violation of *M.S. 122A.40, Subd. 13* or failed to comply with the procedures required of teachers by CPI.

There is no testimony to establish the duration of the incident over time. The whole event, including the statements of Ms. Schultz and Student A could have taken as little as two seconds, especially if the two statements of Ms. Schultz and Student A overlapped. The duration of the event could have been considerably longer. There is no direct evidence on this point.

It would not appear reasonable to conclude that Ms. Schultz could violate the law for improperly restraining Student A for just a very short time, perhaps as little as just 2 seconds. In any event, it would not be appropriate to conclude that Ms. Schultz violated the law in this instance without some evidence in this regard.

*Student B – September 26, 2011*

A preponderance of the evidence establishes that on September 26, 2011, at approximately 1:00 p.m., Ms. Schultz engaged with Student B in an educational activity which caused him to become very anxious and stressed. When his face became red and he became short of breath, Ms. Schulz failed to remove Student B from the educational activity in which he was engaged and place him in an environment in which he could rest and recover quietly. In so doing, Ms. Schultz ignored Student B's conspicuous anxiety and physical medical symptoms, violating his personal Individual Health Plan. Rather than comply with her obligation to de-escalate the tense atmosphere she helped create, Ms. Schultz exacerbated Student B's anxiety by calling his mother and withholding or restricting the use of a toy he planned to play with in an after school program.

Although a preponderance of the evidence supports the conclusion that at about 1:15 p.m. on the afternoon of September 26, 2011, Ms. Schultz improperly pushed Student B into a chair, displaying her anger towards him, this particular conduct cannot form a basis for the discharge. This conduct was not specified in the letter proposing discharge, dated December 21, 2011. This omission fails to comply with *M.S. 122A.40*, which requires that the reasons for the discharge action be set forth in "reasonable detail."

These findings are sufficient to support the conclusion that on September 26, 2011, Ms. Schultz engaged in conduct listed in *M.S. 122A.40, Subd. 13(5)*, and violated Student B's Individual Health Care Plan.

The Union again takes the position that Ms. Clarkin is not a credible witness. However, as is more fully explained in the section entitled "Resolving Conflicting Testimony, the record supports the conclusion that Ms. Clarkin's testimony was credible.

The Union further takes the position that Ms. Schultz did not violate Student B's IHP because she (1) employed proper CPI techniques, (2) acted with the consent of Ms. Beddow-Schubert and (3) did not cause Student B to become ill or hospitalized.

The Union's arguments are not persuasive because, even assuming their correctness, they do not address the specific allegations of misconduct with sufficient directness. The District did not propose to discharge Ms. Schultz for any of the reasons advanced by the Union to justify the conduct of Ms. Schultz. Many of the techniques Ms. Schultz employed during her interaction with Student B might be correct and in compliance with accepted CPA procedures in a different setting. However, when Student B began to display shortness of breath and change color, Ms. Schultz should have complied with the Individual Health Plan and place him in an environment in which he could recover. Instead, she exacerbated the tense atmosphere and Student B's anxiety by reporting Student B's conduct directly to his mother and limiting his use of a favorite toy.

There may indeed have been an appropriate time and place to engage with Student B using these types of techniques. Ms. Schultz' discharge is proposed not because she utilized these methods, but because she used them at a time which was entirely improper and in violation of Student B's health plan - a District policy

specifically designed to protect Student B from having to suffer the very symptoms developed under Ms. Schultz's supervision.

The Union's contention that Ms. Beddow-Schubert specially approved Ms. Schultz's approach because she "knew that Ms. Schultz was holding Student B accountable for his work," is too general to constitute a defense to Ms. Schultz's conduct.

### Resolving Conflicting Testimony

#### *General Guidelines*

In this case, Ms. Schultz's testimony and the testimony of the District's witnesses differed markedly. Ms. Clarkin testified that she observed Ms. Schultz drag Student A across the floor on September 20, 2011. Ms. Schultz denied the entire incident. Ms. Grimm testified that Ms. Schultz improperly restrained Student A on September 26, 2011. Ms. Schultz denied that any such conduct occurred. Ms. Craig testified that Ms. Schultz failed to comply with Student B's Individual Health Plan on September 26, 2011. Ms. Schultz denied the incident, contending that nothing in her conduct adversely affected Student B's health or implicated his Individual Health Plan.

It is the duty of the finder of fact to determine the authenticity, relevance and weight of the evidence, as well as the credibility of the witnesses. This duty presents special problems where, as here, the testimony is so very contradictory.

Determining credibility is not a subjective process. A long line of well-established cases set forth the pertinent considerations and factors. All witnesses in a fact finding proceeding must be evaluated according to their respective *interests* in the

outcome. The fact finder must also consider the ability of each witness to *observe* events, as well as the accuracy of their *memory* and their relative ability to *communicate* what they have seen, heard and remember. Such additional factors as the witness's demeanor and the manner of their testimony are also considered. See generally, Elkouri & Elkouri, How Arbitration Works, (Fifth Ed, 1997) pp. 442-449. See also, South Penn Oil Co., 29 LA 718 (Duff, 1957); Mark VII Sales, 75 LA 1062 (O'Connell, 1980).

The making of a credibility determination might easily be misunderstood by the parties and witnesses. The considerations referred to above have been developed over the years because an impartial finder of fact will never know with absolute accuracy and certitude who is telling the truth and who is not. The observations and memories of witnesses can be influenced by a variety of physical and emotional elements including pre-conceived ideas and a variety of other subconscious influences. A credibility determination does not necessarily brand one witness truthful and the other to be a liar. Rather, making the required determinations is an objective process in which the selected impartial determines what most probably occurred, based on the evidence in the case. This is especially true where, here, the evidence is evaluated against the "preponderance of the evidence" measure, and not the stricter evidentiary standard of "reasonable doubt."

In this dispute, the conflicting testimony must be resolved by relying on the testimony of the District's witnesses. The cases teach that Ms. Schultz's testimony must be considered in the context of her goal to be reinstated. The evidence was insufficient to show any personal interests or improper motivations on the part of the District's witnesses. When compared with the District's witnesses, Ms. Schultz appeared less

willing to provide direct, clear answers with regard to the pertinent occurrences. A more detailed description of the reasons for these conclusions appears below.

*Student A – September 20, 2011*

The Union takes the position that Ms. Schulz “did not engage physically” with Student A on this date and asserts that Ms. Clarkin’s testimony is “lacking in credibility” for a number of reasons. The Union finds it difficult to accept Ms. Clarkin’s testimony indicating that she “walked into the room” without being seen by Ms. Schulz, since she “would have needed to push open a door.” The Union notes that the two other people in the room did not see “it happen.” Ms. Clarkin, the Union suggests, cannot be believed because she didn’t discuss the details immediately with her colleagues and did not document the occurrence “until she was specifically asked” five days later. The Union refers to Ms. Haffner’s statement that she never saw Student A “injured and red-faced” and Ms. Grimm’s statement that Student A “seemed okay.” An alleged lack of “physical evidence” is referred to by the Union, as is the contention that Ms. Schultz was “not physically capable of the described action.” The Union suggests that Ms. Clarkin’s testimony, recalling Ms. Schultz stating that the procedural changes are “just a bunch of bullshit,” is inconsistent with another witnesses who could not recall any comment about “what the restrictions were.”

These contentions certainly raise matters worthy of consideration. However,, they are generally insufficient to successfully challenge Ms. Clarkin’s credibility on this record. Ms. Clarkin presented herself as a mature and stable adult. She had only worked under Ms. Schultz a short time before observing the incidents to which she testified. No

persuasive evidence was introduced to suggest any improper motivation on the part of Ms. Clarkin to offer inaccurate or false testimony.

There is no evidence to suggest that Ms. Clarkin's view of the interaction between Ms. Schultz and Student A was obstructed. Her hesitance in reporting, while not ideal does not affect credibility, especially in the context of the short length of her tenure. Her failure to intervene is also understandable, in the context of the short length of her employment tenure and the fact that Ms. Schulz was her supervisor.

Reference is made by the Union to several alleged inconsistencies in Ms. Clarkin's testimony. A good example is Ms. Clarkin's testimony regarding the "changes from last year" and her testimony that Ms. Schultz used a common swear word to describe them. The Union maintains that Ms. Clarkin's testimony lacked credibility because it was not consistent with the testimony of Mr. Stoikes who testified that she did not "remember Marianne making any comments when you were telling Deb about what the restrictions were."

However, Ms. Clarkin's testimony is not necessarily inconsistent with Mr. Stoikes. It cannot be assumed that Ms. Schultz did not make the comment simply because another witness did not recall any comments relating to the "restrictions." The answers to these questions are not sufficient to cast doubt on the credibility of Ms. Clarkin and the District's other witness because the questions and answers are too general and imprecise to provide reliable evidence of actual inconsistency or inaccuracy.

The Union suggests that Ms. Clarkin could not have opened the door and entered the room unnoticed and asserts that her testimony lacks credibility because no other person present in the room could confirm certain of her observations. The Union further

maintains her testimony cannot be believed because she did not discuss her observations with the other para-educators.

These contentions, while of note, are also not sufficient to challenge Ms. Clarkin's credibility. Whether or not Ms. Clarkin was noticed when she entered the room is not primarily pertinent to the conclusions reached. What is important is that she opened the door, entered the room and made certain observations. Ms. Clarkin's testimony cannot be labeled as untruthful just because no one else shared her observations. Whether or not she discussed with any of her colleagues "the details of what happened," as the Union suggests, the record clearly shows that, immediately after the incident, Ms. Clarkin asked "Kathy Grimm if she saw what happened."

*Student A – September 26, 2011*

The award as it relates to this issue was not made on the basis of an evaluation of witness credibility and it is not necessary to resolve what conflicts exist in the testimony relating to this issue.

*Student B – September 26, 2011*

The District's case was elicited from several different witnesses, including Ms. Clarkin, Ms. Craig, Ms. Beddow-Schubert, Ms. Grimm and Student B's mother. All of these witnesses appeared to be very reliable observers of what occurred and were credible.

The Union again argues that Ms. Clarkin is not credible because she "embellished" her testimony at the hearing and made statements that were

“demonstrably . . . wrong.” For example, the Union compares Ms. Clarkin’s statement that para-educators are not necessarily assigned specific students to the testimony of Ms. Craig, who testified that she was assigned to a specific student on a particular day. Ms. Clarkin’s statement that Student A’s face was red for forty-five minutes is again compared to the testimony of Ms. Craig who testified that she could not recall “at any time in the month of September” whether or not Student A had an injury on his face.” Ms. Clarkin’s testimony establishing that she asked Ms. Grimm if she saw what happened to Student B is compared by the Union to Ms. Grimm’s testimony that she did not specifically recall “anyone talking to you about that incident on the day it happened.”

Like the questions relating to Student A, these questions concerning Student B are not sufficiently specific to produce reliable results for purposes of making credibility determinations.

#### Appropriate Remedy – Is the Conduct “Remediable”

Pursuant to *M.S. Sections 122A.40, Subd. 9 and Subd. 13*, a teacher can be discharged immediately, that is at a time other than the end of the school year, only where the misconduct is not determined to be “remediable” or correctable by means of discipline other than discharge.

The question of remediability is very much in issue in this proceeding. If Ms. Schultz’s misconduct is remediable, she cannot be discharged immediately. If the conduct is not remediable, the proposal to terminate Ms. Schultz’s employment immediately pursuant to *M.S. Section 122A.40, Subd. 13* must be sustained.

The Minnesota Supreme Court has ruled that four factors must be considered in order to determine the issue of whether the misconduct is remediable. These factors are (1) the teacher's prior record, (2) the severity of the teacher's conduct in light of the teacher's record as a whole, (3) whether the conduct presented any actual or threatened harm to students and (4) whether the conduct could be corrected by use of a warning. *Kroll v. ISD No. 593*, 304 N.W.2d 338, 345-46 (Minn. 1981); *Matter of Peterson*, 472 N.W. 2d 687, (Minn. Ct. App. 1991); *In re Etienne*, 460 N.W. 2d 109 (Minn. Ct. App. 1990); *Downie v. ISD No. 141*, 367 N.W. 2d 913 (Minn. App. 1985).

Because the District proposes to immediately terminate the employment of Ms. Schultz without first providing her notice and an opportunity to improve, the standard of proof is rigorous. In *Kroll*, the Supreme Court reinstated a teacher who was accused of holding steel pins under the arms of a student, preventing him from lowering them, during a disciplinary event. However, the Court's decision was based on the lack of probative evidence to prove the misconduct, not because the alleged misconduct was insufficient to support a discharge. In *Etienne*, the Minnesota Court of Appeals affirmed the school board decision to terminate immediately the employment of a teacher who had engaged in sexual relations with a student. In *Downie*, the Minnesota Court of Appeals upheld the discharge of a teacher who had engaged in a series of egregious conduct including entering into a wager with a student using sexual activities as part of the consideration and using vulgar, crude and otherwise inappropriate language when communicating with students.

These cases teach that the strict standards of proof required by the Continuing Contract Act can be met only under circumstances in which there is proof of physical abuse, sexual contact or other egregious behavior on the part of the teacher.

After considering these factors, and as stated in more detail below, it must be concluded that Ms. Schultz's misconduct is not remediable, subjecting her to that part of the law that permits immediate discharge.

#### *Prior Record*

There is nothing in Ms. Schultz's prior record as a teacher which tends to indicate her conduct was not correctable. At the time of the hearing, she had been in the teaching profession for 17 years, including 15 with the District. Her evaluations have always been satisfactory.

The record does contain evidence of two disciplinary events, a non-written warning for improperly using school equipment or resources and for incorrectly releasing private educational information. Neither of these incidents involves the mistreatment of students. There is no evidence to show that Ms. Schultz was not amenable to correction, once her misconduct was called to her attention, based on her prior record.

#### *Severity of Misconduct in the Context of Teacher's Record*

The evidence discloses that Ms. Schultz mistreated two students within a single week. Ms. Schultz pulled Student A across 3 or 4 feet of carpeted classroom floor while holding him by the ankles in clear disregard of District policy. At a time when Student B was clearly struggling with his breathing and becoming red faced, Ms. Schultz failed to

provide him the quiet environment required by his IHP and increased the tension by choosing to telephone his mother and restrict the use of a favorite toy.

Ms. Schultz's actions with regard to Student A indicate a significant disregard of rules specifically designed to protect vulnerable students from mistreatment. The same is true with regard to Ms. Schultz's action attempting to sit Student B in a chair. A clearly applicable health policy, designed specifically to protect Student B, was disregarded. The conduct in both cases was physically abusive in nature and egregious.

Having determined that the misconduct was severe, the case law requires an evaluation of these two incidents in order to determine whether the misconduct is "so outrageous that it cannot be remedied in light of the danger the teacher's presence in the classroom would present." *Kroll* at 345.

The record in this case demonstrates that the detrimental impact of Ms. Schultz's misconduct in these two incidents outweigh the likelihood that the deficiency could be remedied by notice and a reasonable time to correct. In the case of both Student A and Student B, Ms. Schultz's misconduct was not preceded by any unusual student behavior. Rather, the non-cooperation of Student A and Student B, their various attempts to avoid doing their educational assignments, was very typical behavior for them. It was generally typical of the disabled students attending class in the DCD Room.

As a teacher of developmentally or cognitive delayed or disabled students, Ms. Schultz was obligated to conform to the high duty to protect DCD students and provide them with a safe learning environment. By virtue of her misconduct, Ms. Schultz demonstrated a capability of reacting inappropriately to the type of student stimulus that occurs every day in the DCD Room. The behavior was unprecedented, given her

employment history. A first instance of misconduct was followed, less than a week later, with additional misconduct. The unpredictability of Ms. Schultz's behavior and the lack of any unusual provocation establishes that whatever is wrong cannot be remedied regardless of the prior record. Rather, the conduct of Ms. Schultz in these instances demonstrate that she is a behavioral risk to the vulnerable students in the DCD Room.

#### *Actual or Threatened Harm*

In this case, actual harm is not at issue. The evidence is insufficient to establish that either Student A or Student B suffered any actual injury as a direct result of the Ms. Schultz's misconduct.

However, Ms. Schultz's conduct threatened harm to both students. Any time a developmentally or cognitively delayed or disabled student is propelled along a carpeted floor on his face while being held by the ankles, the potential for significant physical or mental harm exists. The failure to implement a District policy promulgated specifically to protect a medically vulnerable student with congenital heart disease is an automatic and palpable threat to his well being.

#### *Failure to Warn*

The final factor required in *Kroll* is whether the misconduct could have been corrected "had the teacher been warned by superiors." Minnesota courts distinguish between conduct that requires a written warning from conduct that is so clearly inappropriate that it will support immediate discharge. In *Downie*, a case which involved specific sexually inappropriate conduct, the Minnesota Court of Appeals rejected the

argument that a warning was required, ruling that “It should not be necessary to tell a counselor that his conduct is inappropriate when the conduct clearly violates the [rules].”

In the context of the ruling in *Downie*, it should similarly be unnecessary to advise an experienced special education teacher not to propel an uncooperative disabled student on a carpeted floor by his ankles or to refrain from continuing to escalate pressure and threats of punishment on a medically fragile disabled student who is exhibiting signs of stress.

Here, Ms. Schultz engaged in conduct that was obviously prohibited. This is not a case in which Ms. Schultz should be judged on the manner in which she exercised professional judgment. The IHP called for Student B to be provided a place to quietly recover any time he exhibited a change of color or “shortness of breath.” The evidence conclusively supports the factual finding that Student B was indeed became red faced and short of breath. The IHP does not authorize the use of professional discretion under such circumstances.

### Conclusion

Having carefully considered the testimony and exhibits received into evidence, as well as the positions of the parties, it must be concluded that the District’s proposal to terminate the employment of Marianne F. Schultz on December 21, 2011, was in compliance with the law and must be sustained.

The grievance is therefore *DENIED*.

## **A W A R D**

1. IT IS THE OPINION of the Arbitrator that the District's proposal to terminate the employment of Marianne F. Schultz on December 21, 2011, was in compliance with the law and must be sustained.
2. IT IS THE AWARD of the Arbitrator that the grievance is  
*DENIED.*

August 8, 2012  
St. Paul, MN

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David S. Paull, Arbitrator