

In the Matter of Arbitration Between

Education Minnesota, Grand Rapids, Local No. 1314) BMS Case No. 07-PA-0639
)
) Issue: Suspension
)
“Union”) Hearing Site: Grand Rapids, MN
)
) Hearing Date: 07-19-07
and)
) Brief Submission Date: 08-24-07
)
ISD No. 316, Grand Rapids, MN) Award Date: 09-12-07
)
) Mario F. Bognanno,
“Employer”) Labor Arbitrator
)

JURISDICTION

Pursuant to the relevant provisions in the parties’ 2005 – 2007 Collective Bargaining Agreement this matter was heard on July 19, 2007 in Grand Rapids, Minnesota. (Joint Exhibit1). The parties stipulated that the matter is properly before the undersigned for a “final and binding” determination. Both sides were afforded a full and fair opportunity to present their case; witness testimony was sworn and cross-examined; and exhibits were introduced into the record.

Post-hearing briefs were filed on or about August 24, 2007. Thereafter, the case record was closed and the matter was taken under advisement.

APPEARANCES

For the Employer:

John M. Colosimo	Attorney at Law
Jessica Bunker	Head Start Teacher, Blue Classroom
Josh Robinson	Director, Special Education
Joseph Silko	Superintendent

Connie Kotonias Lead Teacher, Early Childhood Special Education

Lynn Anselm Head Start Staff, Family Support

For the Union:

William F. Garber Attorney at Law

James Poole Education Minnesota, Staff Representative

Gloria Maas Grievant

David Calliguri Grievance Chairperson

Janice Goudy Teacher, Speech-Language

Cheryl Collinge Education Assistant, Special Education

Diane Klenotich Speech Pathologist and Union Representative

Nancy Ralston Occupational Therapist

I. FACTS AND BACKGROUND

For approximately 26 years, the Grievant, Gloria Maas, has held Early Childhood Special Education (ECSE) or kindred teaching positions with ISD No. 316, Grand Rapids, MN. In her capacity as an ECSE teacher she is normally assisted by paraprofessionals and on occasion by a licensed professional like a speech pathologist or occupational therapist. The Grievant presently teaches “highly needy” 4-to-5 year old disabled students. Each student has an Individual Educational Plan (IEP) that lists goals and objectives and a team-generated strategy for meeting the student’s educational needs. The IEP team includes the teacher, school staff and parents.

On September 20, 2006, the Grievant was “observing” students at Head Start in the so-called Blue Classroom. The other adults in the room included

Jessica Bunker, Lead Head Start Teacher, Roberta Strand Perrett, Assistant Head Start Teacher, and a parent-volunteer. Student “S” was in that classroom, as he had been the year before with Ms. Bunker and Ms. Perrett as his teacher and teacher assistant, respectively, along with several other children. Student “S” is a Down Syndrome child with such limited communication skills that he does not react to directions or reply to questions that are put to him as a part of normal parlance. Therefore, when communicating with him it is necessary to address him face-to-face, to be looking straight into his eyes and to use a combination of verbal and sign languages – as apparently noted in his IEP and as discussed at his IEP team meetings. Student “S” is also physically delayed. At the time of the incident alleged in this case, he was four-years-old but quite small for his age, weighing only 20-to-25 pounds. The case record makes clear that all relevant parties knew of his communicating limitations, including the Grievant. The Grievant previously had him in her classroom; talked with his parents and previous teachers; and knew that he needed face-to-face communication, augmented with signs. Further, the case record establishes that Student “S” was not strong enough to open the Blue Classroom’s door.

On the morning of September 20, 2006, as the class period was about to begin, Lynn Anselm, Head Start Family Support Staff, entered the Blue Classroom to speak with Ms. Bunker. However, at that moment in time, while the Grievant, Ms. Perrett, and the parent-volunteer were in the classroom, Ms. Bunker was not. The latter had left the room for a few minutes to attend to a work-related matter. Ms. Anselm testified that students were on “free time” and

dispersed throughout the room. Using an illustrative diagram of the Blue Classroom (Joint Exhibit 4), Ms. Anselm further testified that as she stood adjacent to the classroom's easel, Student "S" began to walk toward her and, as he did, he passed the Grievant who was sitting on a chair that was located in the middle of the room. Next, she testified that as Student "S" proceeded toward her, the Grievant yelled "stop", in a raised voice; and that as Student "S" continued walking, the Grievant grabbed the boy by one arm, near the elbow, and proceeded to say "come here", and "yanking" him toward her with such force that he "flew for about 3 feet with his feet off the ground." According to Ms. Anselm, the boy "whimpered." Finally, Ms. Anselm testified that she was "very disturbed" by what she had witnessed and that the parent-volunteer had a "shocked" expression on her face. (Anselm's written statement, Joint Exhibit 3).

Although Ms. Bunker was not in the classroom at the time of the alleged event, she testified that later that morning both Ms. Anselm and Ms. Perrett related to her what had happened and that Ms. Anselm's testimony at the arbitration hearing paralleled the independent accounts that the two (2) women communicated to her on September 20, 2006. (Also see Bunker's written statement, Joint Exhibit 3). Moreover, Connie Kotonias, Lead Teacher, Early Childhood Special Education, testified that on the day in question, Ms. Anselm went to see her to report what she had witnessed. Ms. Anselm, according to Ms. Kotonias, was upset. Ms. Anselm testified to being upset because Student "S" is unable to communicate any indication of pain or distress. It was Ms. Kotonias

who asked Ms. Anselm to write-up her observations. (Anselm's written statement, Joint Exhibit 3).

Based on his reading of Ms. Anselm's write-up of the alleged incident, his investigatory interviews with the Grievant, Diane Klenotich, Speech Pathologist and Union Representative, Sue Morkovich, Principal, Ms. Kotonias, Ms. Bunker and Ms. Perrett, plus his review of the Grievant's prior disciplinary record, Josh Robinson, Director of Special Education, took disciplinary action against the Grievant. Specifically, for "...serious and on-going problem[s] with your professional behavior...", he suspended the Grievant without pay for three (3) days: October 2, 4 and 5, 2006. (Robinson's letter dated September 27, 2006, Joint Exhibit 3).

The Grievant's pre-September 20, 2006 disciplinary record includes three (3) separate memoranda, the content of which are summarized below:

1. **October 4, 2004** – Mr. Robinson provided the Grievant with a Professional Work Plan, designed to "flag areas of concern." In the Plan, Mr. Robinson identified five (5) areas of behavioral concerns he had with the Grievant, including point 5, which directs the Grievant to "maintain a positive and supportive demeanor and attitude with students, staff and patients." Mr. Robinson also notes: "Failure to follow these expectations will result in disciplinary action that could include suspension without pay." (October 4, 2004 memorandum, Joint Exhibit 3). The content of this Plan was reviewed with the Grievant in the presence of Employer representatives and a Union representative.

Subsequently, the Grievant prepared a written, point-by-point reply to Mr. Robinson's memorandum. With respect to point 5, which is particularly relevant to the instant matter, the Grievant wrote:

I do tend to be loud at times and work hard to control this. I am not afraid to say "no" to a student and, at times, that then requires that I follow through to the end with their reaction. There have been parents who have not liked this approach at the time. I acknowledge that I do not always do things as the parent wishes. I have always been open to discussing it with the parent and showing them the benefits from holding their child accountable for their actions. With the majority of the parents that are willing to talk with me, they see the necessity of doing as I did. This does not include all parents, as he noted.

(Undated memorandum authored by Ms. Maas, Joint Exhibit 3).

2. August 26, 2005 – Ms. Miskovich and Mr. Robinson provided the Grievant with an expanded Professional Work Plan, as necessitated by "new concerns." The expanded Plan, repeated the five (5) areas of concern identified in the October 4, 2004 Plan, while adding new concerns to points 2 and 5. With respect to point 5 the added caveat is as follows:

Additionally, you will not use physical punishment with any student. This spring, during transition observations, a student refused to give you something he had in his hand. You grabbed his upper arm and squeezed it with increasing intensity until the student gave you the object. The student stated you were hurting him during this incident. Mr. Robinson's observation was you were hurting him. This topic represents a serious, on-going concern that needs your immediate attention. The district will provide you support through the school psychologist and other appropriate personnel to develop more positive and appropriate methods of addressing behavioral concerns with students. You are expected to follow the recommendations provided.

Failure to follow expectations 1-4 will result in disciplinary action that will minimally include a written reprimand and could include suspension without pay. Failure to follow expectation 5 will result in suspension without pay.

(August 26, 2005 memorandum, Joint Exhibit 3). The content of the expanded Plan was reviewed with the Grievant in the presence of others, including a Union representative. Subsequently, she prepared a written, point-by-point reply to the August 26, 2005 memorandum. With respect to point 5, the Grievant wrote in part:

Josh is the one stating that I have an aggressive attitude, I do not always agree with his opinion.

Additionally he states that he witnessed, myself, hurting a child when he visited in February 2005. I have spent considerable time, thinking about this and cannot call up any instance in which I held a student as he states. I have since had a chance to talk to most of the staff that have worked in the classroom with myself and asked them if they ever saw me hurt a student. No one (sic), that is in the room with me, has ever seen anything that they felt was abusive. If in fact, Josh witnessed such a action on my part, why wait 6 months to discuss it? Why did he not talk to myself at the time and point out what he saw?

* * *

(Undated memorandum authored by Ms. Maas, Joint Exhibit 3).

3. **March 29, 2006** – Mr. Robinson directed a “Disciplinary Action” memorandum to the Grievant, informing her that he was taking disciplinary action for her failure to comply with the directives contained the expanded August 26, 2005 Professional Work Plan. Specifically, three (3) problem areas are identified. First, a parent reported hearing the Grievant “yelling at children” and, in a related vein, the Grievant was charged with using a harsh and threatening tone of voice with children: A tone of voice that often does not match the situation. Second, two (2) families with children in the school district have requested that their children not be placed in Grievant’s classroom and/or inquired about alternative programs. Lastly, the Grievant was charged with using inappropriate physical interventions,

and two (2) instances of same are noted. First, a teacher observed that the Grievant forcefully placed her hand on the shoulder of a student who would not sit still at the lunch table; and second, the Grievant restrained an autistic child while at his work table because he was not being compliant. Inasmuch as these problem areas related to point 5 in the August 26, 2005 Plan, the memorandum advises the Grievant that effective on April 6, 2006, she will serve a one (1) day suspension without pay and it goes on to give notice that failure to follow the indicated corrective actions “will result in further suspension without pay or termination.” (March 29, 2006 memorandum, Joint Exhibit 3). The content of this memorandum was reviewed with the Grievant in the presence of others, including a Union representative. As before, the Grievant prepared a written, point-by-point reply to Mr. Robinson’s disciplinary memorandum. The Grievant wrote in part:

Regarding tone of voice ... during a winter fun day ... [T]he students needed to stay in sight of staff; when they did not, it was important to get them back near the others. This can require a firm tone as it is not a matter of debate. I may move to that tone of voice with some students on the first statement since they do not listen to much else; those [i.e., parent volunteers] who are there on a regular basis know that – outsiders may not.

Regarding placing of hand on shoulder ... On the day in question, I do not even remember getting to the lunch room where this supposedly happened as that is the day we made sand castings ... I stated that I did not remember any such incident.

Regarding physical restraint of student .. Josh asked if in fact I had held down a student’s hands to the table. When I said that I had done so, he asked if Chandra or Denise had ever recommended that action. My response was that we talked about the student but that I did not recall if that specific recommendation had ever been made.

* * *

(Undated memorandum authored by Ms. Maas, Joint Exhibit 3).

The record evidence suggests that neither the facts alleged nor disciplinary notice included in the October 4, 2004 and August 26, 2005 Professional Work Plan memoranda were the subject of any grievances pursuant to article XII, section 1, subd.1 in the Collective Bargaining Agreement. (Joint Exhibit 1). Moreover, neither the content of the March 29, 2006 memorandum nor one (1) day suspension without pay that is referenced therein was grieved.

The Grievant testified that her prior disciplinary record (i.e., the pre-September 20, 2006 parts of Joint Exhibit 3) is false or inaccurate and that the allegations that she harshly and angrily “yanked” Student “S” on September 20, 2006 are false. With respect to the latter, the Grievant testified that as Ms. Anselm was entering the Blue Classroom, Student “S” darted toward the exit door and as he did so, she stopped him by putting one of her arms around his tummy and the other under his leg to “scoop” him up.¹ Further, she testified that while she did not remember whether she called-out the word “stop.” she did remember abruptly stopping Student “S” and setting the boy on her lap for two (2) or three (3) minutes and that he did not seem distressed. This testimony is consistent with the Grievant’s written statement, which states:

I don’t remember yanking. I remember [I] scooped him up and brought him back. Student did not seem distressed. She was able to reengage him. Picked him up and brought him back over-arm around his tummy.

(Mass’ written statement, Joint Exhibit 3).

¹ Ms. Maas testified that Student “S” ran toward the door, located at the south side of the classroom. Whereas, Ms. Anselm testified that he walked toward the easel and her and that both were on the west side of the classroom. (Joint Exhibit 4).

When asked on direct examination why she scooped-up Student “S”, the Grievant testified that he was running toward the Blue Classroom’s door and that she feared that he would exit the room, run down the hallway and out of the building, as she alleged he previously did when he was in her classroom. In sum, the Grievant testified that she was concerned for the child’s “safety.” Cheryl Collinge, Education Assistant, Special Education, assisted the Grievant when she had Student “S” in her class. Ms. Collinge corroborated the Grievant’s testimony that Student “S” was a “runner”, necessitating that their classroom’s door be kept shut. Nevertheless, she testified, that he would run out of the room when others would exit and enter it.

Ms. Collinge, Ms. Klenotich, Janice Goudy, Speech-Language teacher and Nancy Ralston, Occupational Therapist, had all worked with the Grievant at one point or another and each testified in so many words that although the Grievant used a louder tone of voice than most, she was neither emotionally nor physically abusive of students and that she was a good teacher.

On October 24, 2006, the Union filed a grievance alleging that the actions the Grievant exhibited on September 20, 2006 were appropriate as she had merely “redirected” the child for reasons of safety. Further, the grievance challenges the efficacy of the pre-September 20, 2006 documentation in the Grievant’s personnel file. Finally, the grievance implies that the three (3) day suspension that was meted out to the Grievant was without just cause and, as relief, it demands full back pay for wages and benefits lost and expungement of the related disciplinary files. (Joint Exhibit 2). The parties were unable to resolve

the grieved matters through grievance negotiations and they processed to the instant arbitration for binding resolution. (Joint Exhibit 2).

II. Statement of the Issue

The issues in this case may be stated as follows:

1. Whether the documents contained in Joint Exhibit 3, which are part of the Grievant's personnel file, shall be expunged pursuant to Minn. Stat. §122A.40, Subd. 19?
2. Was there just cause for discipline in this case? If not, what is an appropriate remedy?

III. Position of the Employer

The Employer initially argues that the content of Joint Exhibit 3 ought not to be expunged from the Grievant's personnel files inasmuch as said materials are not false or inaccurate. Further, except for the materials bearing on the Student S matter, the Employer observes that the other disciplinary documents have never been shown to be false or inaccurate through application of the parties' grievance procedure, as provided in Minn. Stat. §122A.40, Subd. 19.

The Employer argues that the documented allegations about the Student "S" matter in Joint Exhibit 3 are also true and accurate. After pointing to case law that establishes that the applicable quantum of proof standard in cases like this is that of "substantial evidence", the Employer contends as follows: first, given the quantum of record evidence in this case, a "reasonable person" would conclude that the Grievant used excessive and inappropriate force in her dealings with Student "S" and that she has exhibited a pattern of using loud and abusive language and sometimes excessive force when dealing with children under her

supervision; and second, that the materials and documents pertaining to the Student “S” incident are true and accurate.

Further, the Employer observes that dating back to the year 2000, the Grievant has received several warnings that her professional dealings with others and, specifically, with handicapped preschool children, must improve or that formal discipline would follow. Her conduct in this respect continued to fall short and, consequently, the Employer argues the Grievant was given a one (1) day suspension without pay effective April 6, 2006. Further, the Employer argues, on September 20, 2006, the Grievant physically abused a “tiny” four (4) year old Down Syndrome boy who has severe communication limitations by calling out the word “stop” and then abruptly stopping his forward motion by grabbing him by one (1) arm and “yanking” him back toward her, forcefully lifting him off the floor and causing him to whimper. Instead, the Employer urges, the Grievant, who knew about his communication limitations, should have placed herself in front of the Student “S”, looked straight into his eyes and communicated her directives to him using verbal and sign language.

Next, the Employer argues that Ms. Anselm and Ms. Perrett witnessed the Student “S” event and were astonished by the Grievant’s conduct and reported same to Ms. Bunker, on the day of the incident, as well as to the Grievant’s supervisors – Ms. Kotonias and Mr. Robinson – on that day or shortly thereafter. The Employer contends that Ms. Anselm and Ms. Perrett are credible eyewitnesses with no stake in the outcome of the case.

Finally, the Employer urges that the undersigned deny the grievance and dismiss the Grievant's claim that she stopped Student "S" because she feared for his "safety." This argument, the Employer contends, was first raised in the written grievance statement dated October 24, 2006, approximately one (1) month after the Student "S" incident.

IV. Position of the Union

The Union begins by arguing that the Grievant believed that Student "S" would leave the Blue Classroom through its open door and, thus, she took appropriate measures to prevent his exodus. In this respect, the Union contends that the Grievant used two (2) arms to "scoop" up the child, lifting him off the floor before easing him onto her lap, and that while she may have yelled "stop," she did not "yank" him by one (1) arm and/or hurt him, as alleged. Continuing, the Union explains that previously Student "S" attempted to leave the Grievant's classroom and that on one (1) occasion he actually succeeded, running into the street. In this instance, the Union concludes, the Grievant's only interest in Student "S" was to keep him safe, as mandated by the teacher code of ethics at Minn. Rules § 8700.7500, Subpart 2(B).

Moreover, the Union points out that the Grievant's testimony both served to explain or to expand on the facts alleged in the March 29, 2006, memorandum. As she stated in her written reply to said memorandum, she did yell at a student who, on that "winter fun day", appeared to be steering his sled toward the parking lot; and that she did hold down the hands of a student who was throwing items, exposing others to injury. With respect to the August 26,

2006 charge of squeezing a student's upper arm, the Grievant testified that she did not recall the alleged incident.

Further, the Union maintains that the Employer carries the burden of proving the Student "S" allegations and that it failed to do so because neither the parent-volunteer nor Ms. Perrett testified; and because Ms. Anselm's testimony is unreliable since it does not match her Joint Exhibit 3 documentation of the events alleged. In addition, the Union contends that the Employer failed to prove that Mr. Robinson's previous warnings were based on proven misbehaviors on the part of the Grievant and, therefore, the Employer failed to prove that the Grievant is somehow guilty of a "pattern" of unprofessional conduct, including having inappropriate interventions with students.

Next, the Union argues that the Grievant's failure to grieve her previous warnings and suspension does not waive her right to contest the facts underlying them. Further, the Union avers, that the Grievant would have been upheld if she would have challenged the Employer's earlier disciplinary actions. Still further, several of the Grievant's co-workers testified that they had never witnessed inappropriate physical interventions with vulnerable students under her care.

Finally, for the reasons discussed above the Union urges that the Employer did not have just cause for suspending the Grievant for three (3) days without pay; and, therefore, that the Grievant ought to be made whole and that the previously discussed record of this and the earlier events ought to be expunged from her personnel file.

V. Discussion and Opinion

The events of September 20, 2006, precipitated the instant case. On that day, an unusually small Down Syndrome boy, four (4) years old and with limited communicating skills, was in the so-called Blue Classroom of the local Head Start pre-school program. The boy, Student "S", weighed between 20 and 25 pounds and did not have the strength to open the classroom's closed door.² While working in the classroom that morning, the Grievant allegedly loudly shouted "stop" at the boy and when he did not stop, she grabbed him by one arm and "jerked" him back toward herself, with enough force to cause him to fly through the air with his feet off the ground. The Employer found the alleged behavior to be unprofessional and part of an on-going pattern of misconduct about which the Grievant had been previously warned on several occasions.

The Grievant objects to the Employer's documented record of the referenced previous warnings, alleging that said documents are false or misleading in whole or part and, therefore, ought to be expunged from her personnel file. Moreover, the Grievant contends that while she did stop Student "S" as he moved away from her and that she did lift Student "S" off the floor, she did so by "scooping" him up, using both of her arms. and that she did not "yank" him by only one (1) of his arms, as alleged. Further, she testified that she took this measure for safety reasons: The boy was darting toward the classroom's door, as he had previously done when in her classroom.

² That Student "S" lacked the strength to open the classroom door is uncontroverted testimony offered by several Employer witnesses.

Each of the Grievant's contentions will be analyzed in the order presented in the previous paragraph.

A. Expunge pre-September 20, 2006, Documents from Joint Exhibit 3

The Grievant claims that the facts alleged in the October 4, 2004, and August 26, 2005 (professional work plans, advising corrective behavior) as well as facts alleged in the March 29, 2006 (disciplinary action, resulting in a one (1) day unpaid suspension) are largely false and inaccurate. However, the Grievant failed to provide credible evidence to support her claim. Her testimony seldom went beyond the detailed memorandum of denial she wrote in response to each of the Employer's warnings/discipline memoranda. The Grievant's memoranda, which usually include justifications for the way she interacts with others, particularly students, are included in Joint Exhibit 3. Thus, it is not new that the Grievant does not accept the referenced Employer's warnings/discipline memoranda as true and accurate. What is new is that she now wishes to have said memoranda expunged from her personnel file.

For two (2) reasons this request is denied. First, Minn. Stat. §122A.40, Subd. 19 provides for an expungement proceeding. In relevant part, said provision is as follows:

A district ... must expunge from the teacher's file any material found to be false or inaccurate through the grievance procedure ... Expungement proceedings must be commenced within the time period provided in the collective bargaining agreement for the commencement of a grievance.

(See: Minn. Stat. §122A.40, Subd. 19). In the instant case, the parties' Collective Bargaining Agreement specifies that "Said allegation must be filed within 50 days after the incident to be a grievance." (Joint Exhibit 1). That the Employer's

warning memoranda of October 4, 2004 and August 26, 2005, and the discipline memorandum of March 29, 2006, were based on false or inaccurate information was never grieved. Moreover, with respect to the latter memorandum, the April 6, 2006, one (1) day of unpaid suspension was never grieved. In all instances, the Employer reviewed the content of the memoranda in question with the Grievant, giving her the opportunity to respond; and, in all instances, the Grievant had a Union representative present. Technically, the Grievant's expungement request is not timely. But, more significantly, it seems reasonable to conclude that the facts alleged by the Employer in the pre-September 20, 2006 memoranda are settled and that it would be improper to expunge these parts of the Grievant's employment history since they were never grieved.

However, the Union would disagree with this conclusion, citing, as it did, *In re Overhead Door Company of Kentucky and United Brotherhood of Carpenters and Joiners of America, Local 1299* (J. Dworkin, 70 LA 1299, 1978). Therein, Arbitrator Dworkin concludes that it is permissible to review "... prior discipline to determine whether it should be permitted to form a link in the chain leading to suspension or discharge" (p. 1302). In light of this guidance, the undersigned did review the challenged documents in Joint Exhibit 3 and found them to be linked by: (1) specific reference to one another; and (2) the warned-against behaviors. In addition, the testimony of the Grievant and the flattering, but general, characterizations offered by co-workers do not persuade the undersigned that the specific facts cited in the prior warning memoranda and one (1) day suspension letter were false, inaccurate or lacked just cause.

Accordingly, the referenced pre-September 20, 2006 documents are valid parts of the Grievant's personnel file and serve as a legitimate premise to the three (3) day suspension issued as a result of the Grievant's alleged misbehavior on September 20, 2006: The Grievant's employment history does include episodes of unprofessional conduct like being too loud, too harsh and using inappropriate physical interventions when dealing with handicapped students.

B. September 20, 2006

Documentation of the September 20, 2006 event and related post-September 20, 2006 documents included in Joint Exhibit 3 would be expunged from the Grievant's personnel file, if shown to be false or inaccurate. The Employer insists that the facts alleged in relation to Student "S" are true and to prove it, they offer the testimony of eyewitness Ms. Anselm.

The record evidence does not suggest that Ms. Anselm would benefit from falsely testifying about the events of September 20, 2006. She testified that Student "S" began "walking", not "running" as the Grievant testified, toward her after she had entered the classroom through its doorway which is located on the southernmost wall adjacent to a hallway. She further testified that, at the time, she was standing adjacent to the built-in cupboards on the classroom westernmost wall, near the easel, when Student "S" began walking toward her and the easel. That Student "S" was walking westward, as testified by Ms. Anselm, challenges the veracity of the Grievant's statement that Student "S" was running south toward the classroom's door, which is why she "scooped" him up

to prevent him from running into the hallway and toward possible safety hazards that may lay beyond.

When pointedly asked whether Student “S” was walking toward the classroom door, Ms. Anselm answered: “He was not”. Further, she testified that “safety was not involved”. Both Ms. Anselm and Ms. Bunker testified that, unlike the Grievant, they had not experienced Student “S” propensity to “escape” from the classroom. In this vein, Ms. Bunker further testified that her classroom door is always kept shut and that Student “S” does not have the physical strength to open the door.

The conflicting testimony about “scooping” versus “yanking” Student “S” will not be repeated; however, Ms. Anselm made it clear that the Grievant’s misconduct made her angry, as Student “S”, who cannot communicate, did “whimper”: A sound that he makes whether “happy or sad”.

For several reasons, the undersigned accepts Ms. Anselm’s story over that of the Grievant. First, it is the case that Ms. Anselm is not an employee of the school district and that she had no apparent motive for varnishing the truth, while the Grievant certainly does. Second, although the Union disagrees, the undersigned finds that Ms. Anselm’s testimony sufficiently parallels the events she chronicled on the day of the incident. Third, Ms. Bunker’s account of the matter, while hearsay, does serve to corroborate Ms. Anselm’s testimony and the same holds for the testimonies of Mr. Robinson and Ms. Kotonias. Fourth, during Mr. Robinson’s disciplinary interview, the Grievant failed to mention that she acted out of concern for the safety of Student “S”. When asked on cross-

examination why she did not tell Mr. Robinson about her concern for the safety of Student "S", she replied: "I told Mr. Robinson what I did, not why I did it." Faced with the prospect of a three (3) day unpaid suspension, a reasonable person would expect the Grievant to have voluntarily provided her safety explanation, then and there, if it was true, rather than to have waited one (1) month before doing so. Finally, the Grievant's employment history is consistent with the events that unfolded on September 20, 2006, as related by Ms. Anselm.

Based on credible and substantial evidence, the undersigned concludes that the manner by which the Grievant communicated with and physically grabbed and lifted Student "S" on September 20, 2006 was unprofessional and reflective of a serious and on-going problem. For this misconduct, the Grievant was given a three (3) day suspension. This level of discipline is appropriately linked to the existing chain of progressive discipline. That is, the three (3) days of unpaid suspension fittingly follows two (2) written warnings and one (1) day of unpaid suspension.

VI. The Award

For the reasons outlined above, the grievance is denied; the documents included in Joint Exhibit 3 will remain a part of the Grievant's personnel file; and the Employer had just cause for meting out three (3) days of unpaid suspension for the Grievant's mishandling of Student "S".

Issued and ordered on this 12th day of
September 2007 from Tucson, Arizona.

Mario F. Bognanno, Labor Arbitrator