

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KEWASKUM SCHOOL DISTRICT

and

KEWASKUM EDUCATION ASSOCIATION

Case 38
No. 70645
MA-15005

Case 37
No. 70359
MA-14945

Appearances: ¹

Nancy Kaczmarek and Joanne Huston, Legal Counsel, Wisconsin Education Association, 33 Nob Hill Road, Madison, Wisconsin, appeared on behalf of the Union.²

Kathy L. Nusslock and Paul C. Hemmer, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

The Kewaskum Education Association, herein referred to as the “Association” and Kewaskum School District, herein referred to as the “District,” jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Kewaskum, Wisconsin, on April 12, 14, 15 and May 5, 2011. Each party submitted a written argument, the last of which was received on October 31, 2011.

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¹ Aaron Birnbaum, O’Flaherty, Heim, Egan & Birnbaum, Ltd., Attorneys at Law, 135 West Wells Street, Milwaukee, Wisconsin, who represents Ms. Kiser individually, was also present and permitted to observe the proceedings.

² Ms. Huston appeared on brief.

ISSUES

The parties stipulated to the following statement of the issues:

1. Whether the School District of Kewaskum had just cause to discharge Grievant Linda Kiser from her job on November 8, 2010 as a special education teacher?
2. If not, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

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SECTION XIII – NON RENEWALS AND DISMISSALS

No Teacher shall be discharged, non-renewed, suspended, disciplined, reprimanded or reduced in rank or compensation without just cause. Teachers may be non-renewed during their first three (3) years of employment if the reasons for the non-renewal are not arbitrary and capricious.

SECTION XIX – COMPLAINTS

Complaints regarding a teacher made in writing to the administration shall be discussed with the teacher unless prohibited by law. The teacher shall affix his/her signature to a document acknowledging that the complaint has been discussed. Any complaint not discussed shall not be placed in the teachers' personnel file. The teacher shall be given an opportunity to respond to and/or rebut such complaints, and shall have the right to submit such response and/or rebuttal in writing to be filed with any such complaint which is placed in the teacher's personnel file. Such response and/or rebuttal shall be submitted to the administration within five (5) days of the discussion with the Administrator. The teacher may be represented by the Association as any meeting regarding any such complaint.

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RELEVANT STATUTES

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115.787 Individualized education programs.

- (1) Requirement that program be in effect. At the beginning of each school year, each local educational agency shall have in effect, for each child with a disability, an individualized education program.
- (2) Required components. An individualized education program shall include all of the following:
 - (a) A statement of the child's present level of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general curriculum or, for a preschool child, as appropriate, how the disability affects the child's participation in appropriate activities.
 - (b) A statement of measurable annual goals for the child, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general curriculum, and meet each of the child's other educational needs that result from the child's disability.

(bm) For a child with a disability who takes alternate assessments aligned with alternate achievement standards, a description of benchmarks or short-term objectives.
 - (c) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child to do all of the following:
 1. Advance appropriately toward attaining the annual goals.
 2. Be involved and make progress in the general curriculum in accordance with par. (a) and participate in extracurricular and other nonacademic activities.

3. Be educated and participate with other children with disabilities and nondisabled children in the activities described in this subsection.
- (d) An explanation of the extent to which the child will not participate with nondisabled children in regular classes, in the general curriculum and in extracurricular and other nonacademic activities.
- (e)
1. A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on statewide or local educational agency-wide assessments.
 2. If the individualized education program team determines that a child will take an alternate assessment on a particular statewide or local educational agency-wide assessment of pupil achievement, a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child.
- (f) The projected date for the beginning of the services and modifications described in par. (c) and the anticipated frequency, location and duration of those services and modifications.
- (g)
1. Beginning not later than in the first individualized education program that will be in effect when the child is 14, and updated annually thereafter, a statement of appropriate, measurable postsecondary goals for the child based on age-appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills. An individualized education program that indicates a goal of a technical education high school diploma under s. [118.33 \(1\) \(g\)](#) shall specify the course of study that the pupil must take to attain that goal.

2. Beginning not later than in the first individualized education program that will be in effect when the child is 14, and updated annually thereafter, a description of the transition services, including courses of study, needed to assist the child in reaching the goals under subd. [1.](#)
 3. Beginning at least one year before the child attains the age of 18, and annually thereafter, a statement that the child has been informed of the child's rights that will transfer to the child on reaching the age of 18 under s. [115.807.](#)
- (h) A statement of all of the following:
1. How the child's progress toward attaining the annual goals described in par. [\(b\)](#) will be measured.
 2. When periodic reports, such as quarterly reports or other periodic reports issued concurrently with report cards, on the child's progress toward attaining the annual goals described in par. [\(b\)](#) will be provided to the child's parents.
- (i) If the individualized education program team determines that the use of seclusion, as defined in s. [118.305 \(1\) \(i\)](#), or physical restraint, as defined in s. [118.305 \(1\) \(g\)](#), may reasonably be anticipated for the child, appropriate positive interventions and supports and other strategies that address the behavior of concern and that comply with all of the following:
1. The interventions, supports, and other strategies are based upon a functional behavior assessment of the behavior of concern.
 2. The interventions, supports, and other strategies incorporate the use of the term "seclusion" or "physical restraint."
 3. The interventions, supports, and other strategies include positive behavioral supports.

NOTE: Par. (i) is created eff. 9-1-12 by [2011 Wis. Act 125.](#)

(3) Development.

- (a) In developing each child's individualized education program, the individualized education program team shall consider the strengths of the child, the concerns of the child's parents for enhancing the education of their child, the results of the initial evaluation or most recent reevaluation of the child, and the academic, developmental, and functional needs of the child.
- (b) The individualized education program team shall do all of the following:
 - 1. In the case of a child whose behavior impedes his or her learning or that of others, consider the use of positive behavioral interventions and supports and other strategies to address that behavior.
 - 2. In the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's individualized education program.
 - 3. In the case of a child who is visually impaired, provide for instruction in Braille and the use of Braille unless the individualized education program team determines, after an evaluation of the child's reading and writing skills, needs and appropriate reading and writing media, including an evaluation of the child's future needs for instruction in Braille or the use of Braille, that instruction in Braille or the use of Braille is not appropriate for the child.
 - 4. Consider the communication needs of the child, and, in the case of a child who is hearing impaired, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

5. Consider whether the child requires assistive technology devices and services.

(c) The regular education teacher of the child, as a participant on the individualized education program team, shall, to the extent appropriate, participate in the development of the individualized education program of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and the determination of supplementary aids and services, program modifications and support for school personnel.

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(e) The local educational agency shall give a copy of the child's individualized education program to the child's parents with the notice of placement under s. [115.792 \(2\)](#).

(4) Review and revision.

(a) The individualized education program team shall do all of the following:

1. Review the child's individualized education program periodically, but at least annually, to determine whether the annual goals for the child are being achieved.

2. Revise the individualized education program as appropriate to address all of the following:

a. Any lack of expected progress toward the annual goals and in the general curriculum.

b. The results of any reevaluation conducted under s. [115.782](#).

c. Information about the child provided to or by the child's parents, as described in s. [115.782](#).

apply with respect to a child with a disability who is convicted of a crime under state law and incarcerated in a state prison and whose eligibility under this subchapter will end, because of his or her age, before he or she will be released from prison.

- (b) If a child with a disability is convicted of a crime and incarcerated in a state prison, the child's individualized education program team may modify the child's individualized education program or placement notwithstanding the requirements of sub. (1) and s. [115.79 \(1\) \(a\)](#) if the department of corrections has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.
- (7) Construction. Nothing in this section requires the individualized education program team to include information under one component of a child's individualized education program that is already contained under another component of the individualized education program or requires that additional information be included in a child's individualized education program beyond what is explicitly required by this section.

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118.31 Corporal punishment.

(1) In this section, "corporal punishment" means the intentional infliction of physical pain which is used as a means of discipline. "Corporal punishment" includes, but is not limited to, paddling, slapping or prolonged maintenance of physically painful positions, when used as a means of discipline. "Corporal punishment" does not include actions consistent with an individualized education program developed under s. 115.787 or reasonable physical activities associated with athletic training.

(2) Except as provided in sub. (3), no official, employee or agent of a school board may subject a pupil enrolled in the school district to corporal punishment.

(3) Subsection (2) does not prohibit an official, employee or agent of a school board from:

(a) Using reasonable and necessary force to quell a disturbance or prevent an act that threatens physical injury to any person.

(b) Using reasonable and necessary force to obtain possession of a weapon or other dangerous object within a pupil's control.

(c) Using reasonable and necessary force for the purpose of self-defense or the defense of others under s. 939.48.

(d) Using reasonable and necessary force for the protection of property under s. 939.49.

(e) Using reasonable and necessary force to remove a disruptive pupil from a school premises or motor vehicle, as defined in s. 125.09 (2) (a) 1. and 4., or from school-sponsored activities.

(f) Using reasonable and necessary force to prevent a pupil from inflicting harm on himself or herself.

(g) Using reasonable and necessary force to protect the safety of others.

(h) Using incidental, minor or reasonable physical contact designed to maintain order and control.

(4) Each school board shall adopt a policy that allows any official, employee or agent of the school board to use reasonable and necessary force for the purposes of sub. (3) (a) to (h). In determining whether or not a person was acting within the exceptions in sub. (3), deference shall be given to reasonable, good faith judgments made by an official, employee or agent of a school board.

(5) Except as provided in s. 939.61 (1), this section does not create a separate basis for civil liability of a school board or their officials, employees or agents for damages arising out of claims involving allegations of improper or unnecessary use of force by school employees against students.

(6) Nothing in this section shall prohibit, permit or otherwise affect any action taken by an official, employee or agent of a school board with regard to a person who is not a pupil enrolled in the school district.

(7) Nothing in this section abrogates or restricts any statutory or common law defense to prosecution for any crime.

RELEVANT BOARD POLICIES

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STUDENTS

Series 400

Staff Use of Physical Force

Policy 447.1

Any District official, employee or agent may use reasonable and necessary force for the following purposes:

- to quell a disturbance or prevent an act that threatens physical injury to any person;
- to obtain possession of a weapon or other dangerous object within a student's control;
- for the purpose of self-defense or the defense of others;
- for the protection of property;
- to remove a disruptive student from a school premises or motor vehicle from school-sponsored activities;
- to prevent a student from inflicting harm on himself/herself, and;
- to protect the safety of others.

A District official, employee or agent may also use incidental, minor or reasonable physical contact designed to maintain order and control.

The best possible course of action is to gain control of the situation without the use of physical force.

All incidents involving a physical encounter should be reported to the building principal as soon as practical.

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FACTS³

The District is a Wisconsin school district. The Association is the exclusive representative of non-supervisory, non-managerial professional employees of the District. Grievant Lisa Kiser was a teacher employed by the District and represented by the Association. She was discharged for using improper physical force with some of her students. That discharge is the subject of this dispute.

Under the federal Individuals with Disabilities Education Act (herein "IDEA), school districts are required to provide a free and appropriate education for students with "disabilities." Disabilities include cognitive disabilities, behavioral disabilities, and/or medical needs which affect the ability of students to undergo a regular education program and combinations of the foregoing.

The objective of the IDEA is to maximize the educational achievement of those students by providing necessary supportive services. One of the major hallmarks of the IDEA is its system of collaborative planning to meet those needs in which parents, teachers, guidance counselors and others participate in a planning process which culminates in a meeting or meetings to develop an Individualized Educational Plan (herein "IEP") for each student. Once developed, the plan is ordinarily implemented by a special education teacher as the lead administrator of the plan together with such other supportive personnel as is necessary. For example, students with serious medical needs might be assigned a personal paraprofessional to attend to those needs during the school day. The IEP may be revised from time to time by reconvening a meeting of those involved or by agreement of the professionals involved with notice to the parents. It may also be revised by agreement with the parent. It is important to note that although IEP's are a technical educational document, they are written so that parents who are not educational professionals can read and understand what is going to happen with their child.

As will be discussed more below, the whole process is designed to emphasize positive supporting techniques and minimize the use of any negative techniques as much as possible. This is true because positive environments are more conducive to learning.

One of the essential duties of the specialized skill of special education teachers is to make judgments as to the changing circumstances of students on their case load. It is their responsibility to recognize when it is appropriate to experiment with changes in their education program or needs and when it is not appropriate to do so. There is no procedure for the

³ The parties agreed to a protective order to protect the identities of students. The students involved are identified by letters. The mother of Student A is identified by the letter J. Some other facts will be stated in the section entitled "Discussion" below.

experimentation. The teacher is responsible to know when changes should be subjected to the process of changing IEP's.

Ms. Kiser had been a special education teacher in another district for 14 years prior to being hired by the District. She worked primarily in special education at the high school level. She was hired in August, 1992, by the District as a cross-categorical special education teacher.⁴ She worked first at the Kewaskum High School. She then spent six years as a special education teacher in the District's Kewaskum Elementary School (one year) and then Wayne Elementary School (five years). She transferred to the Kewaskum Middle School commencing in the 2008-09 school year.

Special education teachers are directly supervised by the Director of Pupil Services who was Sue Burgard at all material times. Building principals have some authority over special education teachers. Christine Horbas succeeded Kenneth Soerens as Principal of Kewaskum Middle School at the beginning of the 2010-11, year.

While she was employed at Wayne Elementary School, Ms. Kiser was designated by her supervisors to deal with students who had serious behavioral problems. In this regard, Ms. Kiser received specialized training in 2004 and again in 2005, in "Non-Violent Crisis Intervention." As the name implies, the course involved training in using physical and non-physical calming techniques to deal with children who act out their emotions at such a level that they are a danger to themselves or to others. In 2002, she had one child on her case load that she had to frequently physically restrain for periods of twenty minutes or more. In that regard, she developed a relationship with Washington County FACIT program (emergency psychological authorities outside the school) who provided physical assistance to assist with individuals in Washington County who needed emergency physical intervention.⁵ They assisted her in restraining the student mentioned above if the student required long term intervention. The fact that Ms. Kiser had that training had two relevant consequences. First, if disciplinary situations developed involving students who were not assigned to her case load of students who engaged in behavior other teachers could not handle, administrators called upon her to deal with those students.⁶ Second, she tended to have more confidence in her ability to engage in appropriate physical interaction with students than other teachers, including special education teachers, might otherwise have.

⁴ A "cross categorical special education teacher" is one who teaches all categories of special education (emotional disabilities, learning disabilities, cognitive disabilities, and other health impaired). See, tr. p. 617.

⁵ See, tr. p. 939-40.

⁶ See, tr. p. 632.

Ms. Kiser was regularly assigned to room 19, as she had been in all prior years at the school. Room 19 is a small room with an adjacent small office type room. The office type room was regularly used when there was a requirement to put a student in seclusion. It was also used by special education students to use voluntarily when they needed to take time out from their classroom activities. The District had planned to move her to a different room prior the beginning of the 2010-11, school year, but decided not to.⁷

In the beginning of the school year in dispute, 2010-11, the District made a change in the way the middle school operated.⁸ The District changed the operation from a “house system” in which a core group of teachers taught a core group of students at one grade level to a system in which teachers were placed in academic departments and taught certain subjects at grade levels different than the prior year. The District reduced teachers’ preparation time. These changes caused some adjustments for teachers. They also made the adjustment of moving into the middle school more difficult for incoming sixth graders, particularly special education students, because it involved a change from the structure that was used in the elementary school.

Also, at the beginning of the school year, the District increased Ms. Kiser’s case load of students to 10 students. Her case load in prior years, respectively, was 6, 6, 5, 6, and 7. For 2010-11 her case had; 4 students who were learning disabled, one was cognitively disabled, two had other health impairments, and two were emotionally disabled.⁹

The students assigned to Ms. Kiser’s case load included, but were not limited to: Student A (male), Student B (male), and Student C (male). Student A is autistic, bipolar and has Attention Deficit, Hyperactivity Disorder (ADHD).

Student A’s IEP provides in part:¹⁰

[Student A] struggles to remain on task and self-start on a task. He is easily distracted and daydreams often, sometimes letting his mind wander off in the middle of writing a word. . . . His off task behaviors have really affected what he has gained from classroom discussion. Allowing him to work out in the hall or special education room worked for a while, but seems the novelty has worn off.

⁷ Tr. p 477

⁸ Tr. p. 646-7

⁹ See, tr. 645-7, the disparity from ten is due to the fact that students have multiple classifications.

¹⁰ Ex. 15, tr. p. 721

[Student A] displays extreme off task and avoidance behaviors. He is easily distracted by any movement or sounds near him. Instead of beginning a task, he will often wander the room, sharpen a pencil or daydream. It is necessary for an adult to be near [Student A] to continually remind him of the expectations and assist as academically needed. . . . The adult interaction also helps keep him on task. . . .

IEP's set goals for students. Student A' IEP provided that his goal was:

[Student A] will increase the following on task and behaviors to 90%: self start (sic) a task within 5 minutes, remain on task for up to 10 minutes with no more than one adult prompt, utilize class time to complete homework, and decrease all avoidance behaviors (i.e. sharpening a pencil, wandering room, using restroom, talking with peers, etc.

. . .

Student A's IEP does not have a behavioral management plan.

Student B's IEP notes that he has "expressive and receptive language delay which hinders his ability to participate in classroom activities without additional support." It in essence stresses that Student B has ". . . serious anger management issues. His IEP goal is to increase his self-control by having him take "emotional 'time outs' when he is too upset to work in the regular education setting." It sets a goal of: "Student B manages his behavior throughout the school day 70% of the time using anger management techniques"¹¹ All staff members should know where [Student B] goes. [Student B] goes to his "safety area", (sic) when he is too upset to stay in class. While this may be an infrequent event, it gives [Student B] the opportunity to regroup alone without shutting down. Student B should practice procedure so that he can find his way to the specific area/room from any class in KMS."

Student C's IEP states that he does not have behavioral issues. It does state that he has an expressive and receptive language delay which hinders his ability to participate in classroom activities. His stated goal was to increase his "math computation and comprehension at his functional level to 70% independently and 90% with assistance" He was to participate in regular classes except for those times he was to work in Ms. Kiser's resource room for individual or small group reading, math or written language. It also notes that he benefits from a quiet environment for that assistance.

¹¹ Specific techniques are listed here. It also notes that he should depend on having 2-4 trusted adults that he can talk to when he is calm enough to reflect/problem solve the issue.

Student G is a female student. Her IEP notes that she has receptive and expressive language delay with impacts her ability to follow directions and participate during classroom activities. Her goals included increasing her reading level and increasing her organizational skills from 50% independence to 70% independence.

Student R is a thirteen year old female student with Rett Syndrome who is severely disabled. She functions at about the two year old level. She has a paraprofessional assigned to her. Her IEP states that Student R's parents ". . . would not like her not to be left unattended in the restroom due to safety issues. . . ." Her IEP specifies in relevant part:

. . . . [Student R] requires one-to one assistance and/or supervision to fulfill her basic needs. She is taken to the bathroom frequently throughout the day (about every hour and a quarter). Although she does not communicate when she needs to go to the bathroom, she will use the toilet if she is taken to the bathroom consistently and is given encouragement/wait time. [Student R] requires direct supervision when using the restroom. On some occasions, especially when she is tired, she may need verbal cues to complete the necessary steps She needs help cleaning herself after using the restroom. She has started getting up from the toilet on her own when she is finished rather than waiting to be cued. Her jeans need to be unbuttoned and unzipped so she can pull them up, and will again need help with the fasteners and physical assistance to get soap, wash/rub her hands together and dry them.

During class observations, [Student R] has demonstrated developmental delays in the areas of general coordination, strength, balance, locomotor and object control skills. These skills are fundamental and increasingly important as [Student R] progresses through the Physical Education curriculum. When [Student R] doesn't want to do an activity, she will let you know. She needs several prompts to stay on task. She is easily distracted and likes the attention of the other students. [Student R] is able to do a variety of stretching exercises with teacher assistance successfully. She is able to demonstrate 10 curl ups with teacher assistance. [Student R] is able to hold a push up position using an exercise ball for about 6 seconds. She is able to throw an object to a specific target with about 50% accuracy. When she doesn't throw it to her target, it is due to lack of effort/behavior. [Student R] is able to catch a ball from a bounce pass at various distances ranging from 5' to 10'. Catching from a chest pass can be more challenging at times, however she is able to if at a closer distance. She continues to need reminders to watch for the ball. [Student R] does a very good job with prompting, "ready, set, go." She will say "go." She is able to kick a stationary and pitched ball with some success. She tends to kick the ball with little force. She is able to push open most doors throughout the school. She can

latch and unlatch the door in the restroom, but is unable to open her locker unassisted because the latch is heavily weighted and requires strength in her fingers to pull it up. She is able to maneuver a school cart loaded with various weights through the halls, library and office with minimal assistance. Shredding paper is a fine motor activity she enjoys. She can snip fringes on paper with assistance using a spring scissors.

. . .

One of the goals stated in the IEP is with respect to physical education. Her IEP states in this respect that Student R's physical education goals are:

1. [Student R] will be able to demonstrate 12 curl ups, with teacher assistance, 80% of the time.
2. [Student R] will be able to hold a push up position for 15 seconds, using an exercise ball, 50% of the time.
3. [Student R] will be able to throw an object to a specific target, at a distance of 5 feet, with 60% accuracy.
4. [Student R] will be able to catch an 8" ball from a chest pass and bounce pass, at a distance of 7 feet, 7 out of 10 times.

Student A's mother testified that she met with Ms. Kiser at the open house meeting immediately before school began. She stated that she told Ms. Kiser that Student A is autistic, bipolar, and has ADHD. She also stated that she told her that he has anger issues and that certain things will trigger his anger: specifically, that violence around him might be a trigger.¹²

Student B's parents were very concerned that Student B had a "safe place" designated immediately at the beginning of the school year. At the beginning of the school year, Ms. Kiser told all of Student B's teachers that he should be allowed to leave their rooms if he becomes upset. She did not identify any specific "safe place" for them as the place Student B should go when he leaves. She did not do so for any other personnel as well. Student B did not become upset during the first week of school. At the end of about the first week, on September 8, Ms. Kiser had an e-mail exchange with Student B's mother which stated that Student B could use the little room next to her classroom as a safe place. Student B used that room for that purpose at all times thereafter and also met with Mr. Nell, the school guidance counselor as needed. Ms. Kiser never told Student B's teachers or any other school personnel

¹² T. pp. 147-9

that that room was Student B's "safe place" as required by Student B's IEP. Ms. Kiser never practiced with Student B going to his safe place from each of his classes. Ms. Kiser was not afforded enough time in her daily schedule to be alone with Student B at class passing times to do so.

In the 2010-11, school year, the Kewaskum Middle School day started with Advisement, a period when students received announcements and took care of administrative matters. There were seven other periods, except Wednesdays which were shortened days.¹³ On every day but Wednesday, Ms. Kiser conducted an advisement class including regular education students and two of her special education students. In first period, she assisted those of her students who needed extra help in a guided study hall in her classroom. Otherwise those students were in art and similar classes during that period. In second period, her time was split between Mr. Bannasch's science class and Mrs. Stangl's language arts class. Students A, B, C, F and DG were regularly assigned to Mr. Bannasch's class. Students JA, JL, D, ML and E were regularly assigned to Mrs. Stangl's class. In this regard, her students were divided between these regular education classes. Ms. Kiser divided her time as necessary between those students. She assisted the teacher and students not on her caseload as well when she was in her class. In third period, she would similarly split her time between Mr. Grisolono's math class and Mr. Gonwa's social studies class. In period 4A, she would split her time between Mrs. Stangl's language arts class and Mr. Grisolono's math class. The lunch period was next. Then in period 5B she would start the period in Mr. Gonwa's math class and then later in the period go to Mr. Bannasch's science class.

After that period was a twenty minute period called Sustained Silent Reading (herein "SSR"). The purpose of the period is to have students read a self-selected book. At the beginning of the year, Students A, B, C and F were assigned to regular education SSR with a regular education teacher. Ms. Kiser was also present in that class to provide assistance to her students and to the other students. At the end of the first two weeks of school, mid-September, the regular education teacher requested that Students A, B, C and F be removed from her class because they were too disruptive. Thereafter, Ms. Kiser taught SSR to Students A, B, C and F in her own room. She was the only staff member in that room at that time. In Ms. Kiser's SSR class students selected an audio book from the library and were supposed to listen to it continuously during that period. The objective was for Ms. Kiser to assist her students to remain on task. This and the morning study hall were the only classes in which she was alone with those students.

Ms. Kiser chose this time to aggressively work on the IEP goals for the students. She was very stern with Student A, B, and C when they were not performing appropriate tasks.

¹³ Tr. pp. 649-657

She also used “incidental”¹⁴ physical contact to lead Student A back to his seat or placed both hands on his shoulders to remind him to stay in his seat. She used “incidental” physical contact with Students B and C to a much lesser extent. On some occasions when students were daydreaming or not on task, she would put a pencil in their hand and guide them to get to work.

Ms. Kiser would spend the entire hour of the next period, sixth period, in Mr. Wilmas’ technical education class. Some of her students were in art during this period and Ms. Kiser would occasionally check in on that class as well. On “green days” Ms. Kiser had her preparation period in seventh hour and on “white days” she had guided student hall.¹⁵ Some of her students were in a physical education period at that time. On some occasions, she helped those students during that period in the physical education class. On Wednesdays, the schedule was similar, but condensed.

At about the time that Ms. Kiser started teaching SSR in her room to Students A and B, both started feigning illness and going home frequently. This often occurred just before or after lunch. Both Student A and Student B’s attitude toward school changed dramatically at about that time.

At about this time Student A became withdrawn at home and displayed signs of depression. Student A also began abusing his pets. Student A’s mother noticed what she described as small “angry red marks” on Student A’s shoulders about five times during the period in dispute. She was not able to identify what caused them. In early October, Student A started cryptically commenting to his mother about his complaints concerning Ms. Kiser. At various times he alleged that she grabbed students, pushed their head down by the back of the neck, grabbed shoulders, and grabbed arms. In early October, he stated that he wanted to “kill” his teacher and that he wanted to “swing back.” Student A’s mother did not discuss any of her observations with Ms. Kiser.

Student B made a complaint to his mother on one occasion that Ms. Kiser put a pencil in his hand and tried to get him to write. In October, Student B complained to his mother that Ms. Kiser put one of her hands on each of his shoulders and rocked him back and forth. Ms. McKernan-Zunker, a teacher who regularly works with special education students and who witnessed the “rocking” incident called Student B’s mother the evening after the “rocking” incident occurred to report to her the details of the “rocking incident” Ms. McKernan-Zunker believed that it was a matter which should have been reported to the Student B’s mother.

¹⁴ “Incidental” contact is defined and discussed below.

¹⁵ Green and white days are an every other day schedule.

One of the important events in dispute occurred October 12, 2010, during the study hall. Ms. Kiser was alone with Students A, B, C and F.¹⁶ Student A became distracted and approached Student C. Student C habitually positions himself with his chair rocked back on its two back legs. Student A started pulling Student C's study table away from him and Student C kept pulling it back. Ms. Kiser attempted to get the two to stop, but the tussle escalated. Ms. Kiser forcefully took Student A by the arm and returned him to his chair. Student C got out of his chair. Ms. Kiser forcefully took Student C by his arm and returned him to his chair.

On the morning of October 14, 2010, Student A refused to go to school. After some discussion with his mother, Student A asserted that he was afraid to go to school because he was afraid of Ms. Kiser. Student A's mother, who was then recovering from surgery, decided to go to school with Student A. The two arrived at the attendance office and related their concerns to the attendance secretary, Gina Lawniczak, who immediately set up a meeting with the two and Ms. Horbas. While she was setting up the meeting, Ms. Lawniczak related to Ms. Horbas in private that she had seen Ms. Kiser "manhandle" a student in 2006, which incident was ultimately included in the Board's reasons for dismissing Ms. Kiser.

Ms. Horbas called Mr. Nell, the guidance counselor, to be a witness and the two immediately met with Student A and his mother. With his mother present, Student A made the allegations which are the main reason why the District discharged Ms. Kiser. They are discussed more in detail below, but are summarized here from his written statement and testimony at the arbitration hearing. They are that Ms. Kiser on a repeated basis would get "mad" or "yell" on a frequent basis when he got up from his seat, that she would "pinch" the muscles of his shoulder and push him into the chair. He also alleged that at other times, she would grab "our" arms to stop us from walking around. He stated that when "they" were in the library she would make "us" stop typing to make "us" get a drink, but would not let "them" go to the bathroom. He named students B, C, and E, and DG as being subject to similar treatment. He viewed Ms. Kiser as "mean" to him and stated that he was afraid of her and wanted to hurt her.

Ms. Horbas stated an investigation. She decided to submit a written question to all of Ms. Kiser's students. She wrote out the following question for students to answer:

Have you ever felt uncomfortable with Mrs. Kiser as your teacher or advisor?
If so, could you write about that time or times?

She directed Mr. Nell to bring each of Ms. Kiser's students to his office and have them write their answers without any questioning before, during, or after writing their answers. She also

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¹⁶ This is a summary of my conclusions as to what occurred. These conclusions are discussed in more detail in the section marked "Discussion" below.

directed that Mr. Nell keep each of these students separate from the others after they wrote their statement.

In the meantime, Ms. Horbas called Sue Burgard, Director of Pupil Services (Ms. Kiser's direct supervisor) to come to the Kewaskum Middle School as quickly as possible. Ms. Burgard arrived shortly. Ms. Horbas and Ms. Burgard then re-interviewed Student A and his mother. At that time, Student A's mother stated that she had repeatedly seen small "angry" red marks on Student A's shoulders and had been trying to figure out where they come from. Ms. Horbas did not seek to have either Student A or his mother make a written statement at that time because she viewed the mother as too emotional and/or ill to continue and Student A as too emotional to be effective staying in school.

Mr. Nell obtained written answers to Ms. Horbas' questions from Students B and C. Student B wrote (spelling corrected):

She would rub my shoulders really hard and I do not like that at all.

Student C wrote (spelling corrected):

When Ms. Kiser gets mad, she grabs me in a violent way. I get right scared and she pinches me on the shoulder when she is mad.

Ms. Horbas went to Mr. Nell's office as Student C was finishing his written statement. He explained his wording. He also explained his statement that Ms. Kiser acted in a "violent way" to refer to the fact that she pulled his arm. He also physically demonstrated "pinching" his shoulders to mean putting the forefinger in the Trapezoid area of the neck and the thumb on the back of the shoulder and pushing with all of Ms. Kiser's might. Ms. Horbas and Ms. Burgard also reviewed the written statement of Student B.

Based upon the information they had, they determined to suspend Ms. Kiser immediately. They met with Ms. Kiser and her Association representative, Kevin Chambers, at end of the school day, October 14. They suspended Ms. Kiser pending further investigation. In that discussion, Mr. Chambers suggested that Ms. Horbas change the question she was using and the two agreed on the following question for future statements from students:

How have you felt about working with Ms. Kiser as your teacher or advisor?
Could you write about that?

Thereafter, the District used that question in taking statements from all students. Ms. Horbas and Ms. Burgard then suspended Ms. Kiser with pay immediately.

Ms. Horbas and Ms. Burgard continued investigating the following day. Ms. Horbas, with Ms. Burgard's review, prepared a summary of the allegations identifying students by pseudonyms only.

On October 19, 2010, without providing any copy of any of the allegations or summary thereof before or during the meeting, Ms. Horbas, Ms. Burgard, and a secretary (to take notes) met with Ms. Kiser and Mr. Chambers. Ms. Horbas read each of the allegations and asked Ms. Kiser to comment on each. Ms. Horbas did not identify the students involved. Ms. Kiser acknowledged some incidents, but could not provide answer to the others. Ms. Horbas then prepared a revised summary with Ms. Kiser's transcribed answers together with a recommendation that Ms. Kiser be dismissed from employment.

On October 21, 2010, the four met again without the secretary. Ms. Horbas reviewed her revised summary with Ms. Kiser and Mr. Chambers to see if they had any revisions. They accepted some of Ms. Kiser's proposed revisions and rejected some. The final summary and recommendations were then submitted to the Superintendent who prepared a formal recommendation for dismissal dated November 3, 2010.

By letter dated October 26, 2010, addressed to Ms. Horbas, the Association's UniServ Director, Sam Froiland, requested a copy of the District's notes of its investigation together with any other document the District thought was relevant to the matters in dispute.

The School Board held a hearing concerning the dismissal of Ms. Kiser on the evening of November 3, 2010. The District did not provide a copy of Ms. Horbas' summary of the investigation in response thereto, but on the morning of November 3, 2010, it did fax to Mr. Froiland a copy of Student A's statement and his mother's statement both signed November 1, 2010. That afternoon, it faxed a copy of Mr. Nell's notes of his October 14 interview with Student C with Ms. Horbas.¹⁷ He first saw it that afternoon. Ms. Kiser attended the Board hearing represented by Mr. Froiland. She did not testify, but did answer questions by the members of the Board. Ms. Kiser first saw those documents moments before the Board hearing.

The School Board voted to dismiss Ms. Kiser and issued the following:

FINDINGS

1. That without excluding other potential findings based on the record, there is substantial credible evidence that:

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¹⁷ Mr. Froiland and Mr. Chambers did get to review the District's personnel file for Ms. Kiser prior to November 3, 2010. It is possible that Mr. Chambers did transmit a copy of Ms. Horbas' summary of the investigation to Mr. Froiland between October 21 and November 3. See, tr. pp. 795-7.

- a. Student A was repeatedly pinched in the trapezoid area of the neck and shoulder, bent at the arm, pulled by the arm, pushed into his chair and had his hand forced down onto a desk by Linda Kiser. This has had a substantial adverse impact upon him, in significant part because of his disability, and in response to which his mother presented a formal complaint.
- b. Student B was pushed down and squeezed on his shoulders by Linda Kiser. Student B stated that this did not make him feel good, but rather, uncomfortable. Student B has further been roughly rocked from side to side by Linda Kiser in order to have him refocus.
- c. Student C has been pinched in the trapezoid area of the neck and shoulder by Linda Kiser when angry, causing the student pain and to feel uncomfortable. The hand of Student C was further slammed into her table by Linda Kiser in order to redirect Student C to work. Student C has observed other students have their arms grabbed and bent at the elbow and then moved to their seats by Linda Kiser.
- d. Student E observed Linda Kiser grab Student A by the arm and place him back in his seat after he failed to respond to warnings to do so.
- e. Student F observed Linda Kiser grab both Student A and Student C by the arm twice and once or twice respectively, as well as to raise her voice more times than could be recalled. Student F always conformed to the instruction of Linda Kiser in order to avoid being grabbed by the arm like other students, something which frightened him.
- f. Student G was grabbed by the shoulder and pulled by Linda Kiser to another occupied classroom in an attempt to compel Student G to enter the classroom to pick up a spelling test which she had dropped. Linda Kiser was unsuccessful in pulling Student G into the classroom when the student resisted by holding on to an adjacent door.
- g. In 2006, Support Staff Person A observed Linda Kiser grab a student by the arm in a rough manner.

- h. Support Staff Person B observed Linda Kiser grasp the hands of a student in order to control them and prevent the student from wringing her hands on a continuing basis. Support Staff Person B observed Linda Kiser grasp the student by the shoulders and turn the student in order to have the student observe others who were performing a physical activity in a manner which Linda Kiser was attempting to teach. Support Staff Person B was herself pushed on one occasion by Linda Kiser with an instruction to leave the student alone. Support Staff Person B further related that Linda Kiser regularly refused to conform to the IEP of the student or the instructions of the parents of the student, electing to instruct and manage the student as Linda Kiser considered appropriate. Support Staff Person B further observed other students shrug their shoulders when Linda Kiser walked behind them.

Ms. Kiser was replaced on October 14, with another special education teacher. At some point thereafter, the District provided another person to assist the replacement.

Student A's attitude toward school got better at first, but then his attitude got worse. Ultimately, Student A's parents and teachers determined to reduce his school attendance to half days.

Student B's frustration with school remained very high. Ultimately, the District and Student B's teacher decided to have Student B also work with a male special education teacher from the high school at times. That teacher would come over and have lunch with Student B at the middle school. Student B was only allowed to work with the teacher if he behaved well. This was a significant motivation for Student B to behave well. The new teacher established a "safe place" for Student B in December.

The Association filed the grievance which is the subject of this dispute. The grievance was properly processed to arbitration.

POSITIONS OF THE PARTIES

District¹⁸

¹⁸ The Employer also argued that Student C's written statement and that of District witness recounting his statements should be admitted pursuant to Sections 908.03(2), (3) and (24).

The District had just cause to discharge Ms. Kiser for using excessive physical contact with some of the students with disabilities assigned to her special education class, including, but not limited to, using force in some instances to comply with her instructions. Student A testified that when Ms. Kiser became angry, she expressed her displeasure by grabbing Student A by placing one hand on each shoulder on each side of the nape of his neck and “squeezing” really hard, leaving red marks and bruises on his neck. Student A’s mother said she saw these red marks at least five times. Student A testified that Ms. Kiser used this method to get him to cooperate with her instructions.

Student A also witnessed her do the same to Student B. Student A testified that he had to calm Student B down because Student B was angry. Student A also saw Ms. Kiser do the same to Student DG who he viewed as “very special.”

Ms. Kiser also took Student A’s hand and slammed it down very hard. This did not happen as frequently as the shoulder pinching. She also grabbed his wrist by the pressure point and then slammed it hard to the table so that it made a big “knock.” He also complained that Ms. Kiser grabbed him by the wrist and arm and then pushed him by the elbow. He also saw Ms. Kiser slam the wrist of Student C down which she did more frequently to Student C. Student C complained to Student A about the pain when it was really bad.

Student A’s mother testified that Student A was excited about school at the beginning of the school year. He began to resist going to school and feigned being sick often. He was depressed and stressed out. He started abusing family members and his pets. Student A said that he was afraid of Ms. Kiser.

Student A’s testimony is consistent with the statement he gave the District in its investigation.

Student B testified that he, too, became afraid of Ms. Kiser. He testified that Ms. Kiser rocked him back and forth which made him very angry with her. The rocking was admitted by Ms. Kiser and witnessed by a fellow teacher, Ms. McKernan-Zunker. Student B has and comprehensive difficulties and an expressive language delay. He needs short concise instructions and time to consider them. Instead, Ms. Kiser became impatient and used the rocking maneuver to get Student B’s attention.

Student B also testified that he was pinched in the shoulders in virtually the same manner as Student A described it. He described this as painful and that it made him very angry. He said that he asked her to stop, but that she ignored his request.

Student B thus corroborates Student A’s story. Student B also testified that Ms. Kiser failed to meet his educational needs in another way; by not designating a “safe spot” and

practicing going there. Student B's mother confirmed that Ms. Kiser did not do so. Ms. McKernan-Zunker also confirmed that Ms. Kiser did not do so and that one was only established in October or November by Ms. Kiser's replacement.

Student B's statement to the District is entirely consistent with his testimony at the hearing herein.

Student C was not permitted to testify by his mother. He did complain to the District when he was interviewed and the District acted upon his statements in that investigation. His statement corroborates the statements of the others. He said (errors corrected):

When Ms. Kiser gets mad, she grabs us in a violent way. I really get scared and uncomfortable and she pinched us on the shoulder when she's mad.

Student C demonstrated Ms. Kiser's actions. This included putting both hands on the shoulder as the other students alleged and squeezing with her thumb and forefinger hard. He also demonstrated that Ms. Kiser would grab the wrist and then push them by the elbow to their seat. He also showed how Ms. Kiser would grab his hand and slam it to the table, while yelling "get to work." He confirmed that Ms. Kiser used force on both him and Student A. Student C also confirmed that Student B was rocked back and forth.

The statements from students were gathered in a way in which they were not able to discuss with each other what they had said. This tends to corroborate their statements.

Student G complained while she in a dispute over homework with Ms. Kiser, she forcefully pulled her fifteen feet down the hallway to a classroom where she had left her homework assignment. Student G has also been consistent in her statements.

Ms. Kiser admitted that she "guided" Student G down the hallway with one hand on her wrist and one resting on her back. This is consistent with what the other students described. However, the students are all consistent that she used far more force than she acknowledged. Student F also corroborated the allegations of Students A, B and C. He also testified that Ms. Kiser was yelling while she did this.

Ms. Lawniczak testified that she had seen Ms. Kiser grab a student's arm in a manner which was forceful and inappropriate. She thought it was very rough. This is important because an outside adult witnessed a manner of forcefulness similar to that to which students testified.

Ms. Kiser also admitted to various forms of contact with students as a means of controlling students. She admitted to using "redirection" which was pressure on the students'

necks and shoulders to control the children wandering the classroom and force them to go to their seats. She also used “redirection” to force students to stay in their seats. She also acknowledged taking students by their wrists and “redirecting” them to their seats. She acknowledged the rocking incident. This was contra-indicated by the IEP of the student. Kiser also admitted that pinching students’ shoulders to leave red marks constituted unacceptable behavior. She also made a number of other admissions in her various statement and testimony.

The excessive physical force that Ms. Kiser used is not authorized by applicable law, regulations and the IEP’s of the students in dispute. Section 118.31, Stats, forbids the use of physical pain as a method of discipline or control. It does allow the use of force to prevent a student from harming himself or others. It expressly permits “incidental, minor and reasonable physical contact designed to maintain order and control.” This is mirrored in the applicable board policy, Sec. 447.1. However, there are more stringent restrictions created by federal and state law concerning students with disabilities. The IDEA requires all public school districts to provide a “free and appropriate” education for students with disabilities. Chapter 115, Stats, implements that requirement.

The guidelines and directives of agencies charged with administering the IDEA are another source of rules and regulations for the use of physical contact with students. These include the Wisconsin Council of Administrators of Special Services (WCASS) and Wisconsin Department of Public Instruction (DPI). In this regard, they have established guidelines which require that “restraint” be used only as a last resort and only in an “emergency” when there is an immediate danger to the student and/or others. “Physical Restraint” is defined as:

Holding a student in order to restrain his/her movement; use of physical force, without the use of any device or materials, to restrict the free movement of all or a portion of a student’s body.

WCASS also specifies that the use of “restraint” should be included in the student’s IEP plan as soon as possible:

The use of restraint should be part of the student’s IEP which should also include a positively focused behavior intervention plan (BIP) based on functional behavioral assessments (FBA). Including the use of restraint in the IEP provides an opportunity to discuss its use with the parents and staff, as well as to answer any questions, define when and how restraint will be used, demonstrate the technique(s) to be used, etc. Dangerous behaviors and safety issues may override reluctance to use physical restraint. Concerns should be discussed at the IEP meeting, and parent concerns should be documented on the IEP. Every attempt should be made to avoid the use of physical restraint, but

safety concerns are paramount. If there was no prior indication that restraint might be a necessary intervention for a particular student, an IEP meeting should be held as soon as possible after the first use of restraint so that the team may address necessary revisions of the IEP/BIP.

Ms. Kiser is professionally responsible to understand these requirements. She has acknowledged having received training specifically in the use of restraint. She also acknowledges having been specially trained in non-violent crisis training. The District also provided her with regular training on the meaning of and use of restraint. Certain crisis interventions are prohibited under any circumstance. The District transmitted this information to Ms. Kiser. It is prohibited for a teacher at any time to use:

Any technique that utilizes pain inducement to obtain compliance or control, including punching, hitting, hyperextension of joints, or extended use of pressure points or pain compliance

Ms. Burgard, who is responsible for administering the District's special education program, testified that she was present when the students identified the conduct of which they complained. She testified that their descriptions constituted "restraint" within the above definition. This included

- Using pressure points on the shoulders to inflict pain to the point of leaving red marks and/or bruises;
- Holding the arms while putting pressure on the elbow;

While Ms. Kiser viewed her actions as "redirection," they were, in fact, "restraint" and restraint of a type prohibited under any circumstances. Further, she offered her expert testimony that a teacher may not use either physical force or physical contact with a special education student unless it is documented in the student's IEP. Ms. Kiser's attempts to diminish the severity of her conduct are flatly contradicted by the fact that the children have all had consistent versions of the true level of force used.

Ms. Kiser's disciplinary history demonstrates that she has a pattern of ignoring the requirements of the IDEA. Further, the evidence also indicates that after prior discipline she continued to ignore the IEP's of students on her case load. In 2006, she was reprimanded for implementing accommodations for students taking the WKCE test which were not included in their IEP's. On October 12, 2007, Ms. Kiser was again suspended for failing to implement the IEP of a different student. On June 2, 2010, Ms. Kiser was again suspended for conducting an IEP meeting without the student's regular education teacher.

Ms. Kiser violated the IDEA again in the 2009-10 and 2010-11, school years. She failed to establish a “safe place” for Student B. She also failed to implement Student R’s IEP, a special needs student with Rett Syndrome. It requires one-on-one attention. The District accordingly assigned Ms. Amerling as a paraprofessional aide to perform that function. The IEP requires that Student R be provided with a separate physical education class and that she have adult supervision for toileting. Ms. Kiser violated the specific physical education limitations in the IEP and pushed Ms. Amerling from a toilet stall while she was helping Student R. This all came to light as a result of the investigation into the current allegations.

The decision to discharge Ms. Kiser is also consistent with arbitral precedent. The District can only meet its duty to care for students if it can rely on teachers to not intentionally inflict pain or potential injury on students.

The District’s investigation was fair and thorough. Ms. Kiser has suggested that the investigation was flawed by virtue of the District having not required a written statement by the complaining parent allegedly in violation of Article XIX of the agreement. That Article does not require the District to obtain written complaints. The substance of the complaint was discussed with Ms. Kiser promptly. Ms. Kiser was given an adequate opportunity to explain her conduct. Ms. Kiser was given a copy of the report of the investigation and an opportunity to offer suggested modifications. The School Board held a hearing and gave Ms. Kiser an opportunity to testify. It met its due process obligation as a matter of law.

Discharge is the only appropriate remedy. The single most important factor is that fact that Ms. Kiser’s deliberate use of pain to control students is that it has a detrimental impact on students. It has an ever greater impact on students who have disabilities. It will exacerbate their disabilities and make them fearful of the learning process. This teacher’s actions subjected the district to civil liability. The fact that the disputed actions were recurrent made the conduct far more severe.

The arbitrator should defer to the Board’s determination of penalty. The Board’s decision was a considered decision supported by the arguments recited above. The District asks that the grievance be denied in its entirety.

Association

The District bears the burden to prove that it had just cause discharge Ms. Kiser. The weight of arbitral authority establishes that the quantum of evidence should be “clear and convincing.” The standard of just cause essentially requires that the Arbitrator determine not only that just cause existed to impose discipline but that the discipline is, in the arbitrator’s judgment, appropriate.

The District did not have just cause to discharge Ms. Kiser. First, it did not follow proper procedures in that it conducted a thorough and objective investigation. Principal Horbas was “slapdash” in her investigation. For Example, she did not examine Student A’s shoulder area for signs of the red marks and bruises in dispute. Further, the District violated Section XIX, the complaint procedure. Ms. Kiser did not get a copy of the complaint leading to the investigation until the day before the Board hearing. She was therefore denied the opportunity, to “discuss” the same with the administration as contemplated by Article XIX. This prejudiced Ms. Kiser because Student A’s mother testified that she did not observe “angry red marks” on her son on October 14, 2010; however, Ms. Horbas’s report indicated that she had stated that she had seen them.¹⁹

Second, Ms. Kiser should be believed. The District’s case suffers from many shortcomings. The District failed to produce two key witnesses, Student C and Student E. Student C alleged that Ms. Kiser pinched him in anger in the trapezoid area of the neck and shoulders and also that she slammed his hand to the table in order to redirect him to work. Student E allegedly observed Ms. Kiser grab Student A by the arm and place him back in his seat after he failed to respond to warnings to do so. The Arbitrator should draw an adverse inference from the District’s failure to call them as witnesses. The foregoing statements are not “excited utterances” of the type which might be admissible under Sec. 908.03(2), Stats. Ms. Kiser is credible whereas Student A’s mother was inconsistent in hers. Ms. Kiser cooperated in the investigation and was consistent throughout. By contrast, several of the District’s witnesses were inconsistent in their accounts. Most notable, was Student A’s mother. Her verbal allegation on October 14, 2010, was that Student A’s mother had observed red marks on Student A’s trapezoid area on Tuesday, October 12, 2010. However, Student A’s mother’s written statement, she does not state that she observed red marks on Student A. on October 12, 2010. Upon cross examination at the hearing, she testified that she had not observed marks on Student A on that day, but had only observed them on five earlier occasions.

The evidence fails to establish that Ms. Kiser engaged in excessive physical force. Ms. Kiser denied the allegations found in the Board’s Findings of Fact. She acknowledged using putting her hands on A’s shoulders in cupping fashion, and applying firm pressure. She testified that Student A was not in any pain or showing any resentment or resistance when she did that. There is no competent evidence to establish any physical injury to Student A. The District did not try to document any physical effects. Student A’s mother was inconsistent in her testimony about what she testified were “angry red marks.” Moreover, the evidence demonstrated that there were a number of others who could have caused the purported red marks. Student A’s claims that Ms. Kiser grabbed the muscles of his shoulder “every day”

¹⁹ References to the transcript in this proceeding will be referred to as “tr. p. *” See Dist. Exhibit 38 and tr. p. 563-4.

and “most of the time” are inconsistent physical fact and the observations of other teachers. Some of his other claims are inconsistent with the time of day he was with Ms. Kiser. None of Ms. Kiser’s students ever voiced any complaint to other teachers. Finally, much of the District’s case is contradicted by the observations of Student A’s teachers from the year before.

Ms. Kiser’s denial of the disputed allegation about Student B is believable. Student B never alleged being “squeezed” on his shoulder (only rubbed). Ms. Horbas’s questioning of him was suggestive and inconsistent with what Student B wrote and testified to at hearing. Mr. Nell’s written statement says that Student B only complained about Ms. Kiser’s putting his hands on his shoulders and not about “pinching” or “squeezing.” Student’s B’s testimony was inconsistent with his prior statements. Expert testimony by Speech Pathologist McKerman-Zunker indicates that Student B tends to say things which distort reality.²⁰

Student B was assigned to Ms. Kiser’s room for only 20 minutes per day on Monday, Tuesday, Thursday, and Friday for silent reading and not at all on Wednesday. There was little opportunity for her to have engaged in the conduct alleged. Additionally, the silent reading was not a situation where the alleged conduct was likely to occur.

It is Student C and not Student B who initiated the “rocking back and forth” allegation. While Student B testified that he hurts easily, he testified that it did not hurt when Ms. Kiser attempted to rock him. Ms. McKerman-Zunker witnessed Ms. Kiser rock student B and testified that she viewed it as a tactile prompt and that she had not considered it to be inappropriate.

Student B’s allegation that the “rocking back and forth” occurred quite a few times and that it got him angry is questionable given that Student B did not independently raise this allegation in his written statement in response to the investigation question.

The arbitrator should draw an adverse inference against the District for failing to produce Student C and his mother as witnesses. Student C’s statements to the District’s investigators do not constitute an “excited utterance” within the meaning of the exception to the hearsay rule.

The District has not offered any proof that Ms. Kiser’s actions were done out of anger or otherwise improperly motivated. Ms. Kiser credibly testified that she was very firm with students and insisted that they only engage in appropriate activities. Students often view this as being “angry.”

²⁰ Tr. pp. 387, 403

The arbitrator should ignore Student E's written statement because the District did not present Student E as a witness. Ms. Kiser has not had an adequate opportunity to cross examine this student.

Ms. Kiser acknowledged grabbing Student A's arm, when she needed to intervene for safety reasons on October 12, but denied that she pushed him down in his seat by the arm. She acknowledged applying firm pressure on Student A so as to convey the message that she wanted him to remain in his seat until his work was done at a different time.

She acknowledged that she may have taken Student C by the arm when he was improperly passing out papers in class at a different time. The particular Board finding that Ms. Kiser grabbed Student C by the arm once or twice does not comport with Ms. Horbas' written investigatory report which does not state that Student F said that Ms. Kiser grabbed Student C's arm. Moreover, Student F changed his story at hearing to allege that Ms. Kiser grabbed the arms of all three students, A, B and C. His testimony at hearing was embellished with details he could not remember at first. Student F did not observe Ms. Kiser ever pinch any student on the shoulder. He did not allege that any student was hurt by the conduct he saw.

Contrary to the assertion of the District, Student F was not afraid of Ms. Kiser, but conformed to her directions because he did not want to get an infraction.

Ms. Kiser unequivocally denied pulling Student G down the hallway. She acknowledged that she had on a semi-regular basis "guided" Student G down the hallway to get materials she habitually forgot. She did not do this in any way to cause pain. In any event this is a stale allegation stemming from spring, 2010. Student G's testimony is unreliable.

Support Person A's allegation must be dismissed as too old. There is no way the Association can investigate this charge.

Support Person B's about Ms. Kiser grabbing the hands of a student. This was not raised at the time. Student R compulsively wrings her hands and has done so to the extent that they are now deformed. This is consistent with the student's needs. This charge should be dismissed for lack of proof.

Support Person B's allegation that Ms. Kiser turned Student R by the shoulders is insufficient. This allegedly occurred in a prior year. There is no evidence that this occurred, that there was any injury, or that it was at all inappropriate.

Support Person B's allegation that Ms. Kiser pushed her out of the bathroom stall while the two were disagreeing over toileting Student R is without any merit. This was raised at the time and the District determined that it was not a disciplinary issue.

Ms. Kiser's acknowledged physical contact does not violate the District's use of force policy. Ms. Kiser acknowledged that she physically "guided" students back to their seats on a semi-regular basis. She credibly testified that she did not consider guiding a student back to his or her seat to be a form of restraint because she did not restrict the student's movement. She viewed this as minor or incidental physical contact used to maintain classroom control. Ms. Kiser testified that because she had a number of students with attention deficit or hyperactivity, she had to guide these students back to their seats to keep classroom distractions to a minimum. Ms. Kiser testified that she had on numerous times redirected Student A and asked, then guided him to his seat to minimize distractions. She considered this to be incidental contact.

Ms. Kiser also testified to an incident occurring in the first hour on October 12 or 13, 2010, in which she interceded in a horseplay incident between Student A and Student C. Ms. Kiser interceded by grabbing Student A before he could cause Student C injury by pulling a table out from under him. She acknowledged putting firm pressure on Student A to sit down in his seat in order to quickly convey the message that she wanted him to stay seated. She acknowledged that she may have taken Student C by the arm when he was passing by to get pencils to quickly get him to his seat. This conduct was necessary to protect the safety of the student C and was consistent with the District's use of force policy.

She also acknowledged an incident in which Student C started inappropriately distributing markers and materials. In that incident she took the materials away from him without conflict and physically directed him without force to his seat.

Ms. Kiser also recounted an incident in the library when she rocked Student B while he was in his seat to redirect his attention to the proper task. This occurred as a last resort and did not involve any form of restraint. Ms. McKernan-Zunker witnessed the event and corroborated Ms. Kiser's version of the events.

Even if Ms. Kiser were culpable, the penalty of discharge is too severe. Ms. Kiser was not given an adequate warning. The District has not properly applied progressive discipline. The District has never disciplined her before for excessive force. It has not considered Ms. Kiser's considerable length of service. The Association requests that the grievance be sustained and that Ms. Kiser be reinstated and made whole for all lost wages and benefits.

District Reply

The District has established just cause for the termination of Ms. Kiser regardless of the legal standard applied. Arbitrators recognize that some situations are so serious that discharge is the only appropriate remedy. This is one such circumstance. The District recognizes that it has the burden to persuade the arbitrator that Ms. Kiser engaged in misconduct, but the Association must bear the burden to persuade the arbitrator that the penalty is excessive. The quantum of proof should be a preponderance of the evidence.

The Association contends that discipline is inappropriate because there is no proof of physical harm. This is the incorrect standard. The misconduct is the intentional and substantial disregard of the District's interests. The District properly gave her notice of its intent to dismiss her and acted in accordance with law in dismissing her. The Association's criticism of the investigation is misplaced. Ms. Horbas was impartial in her investigation. It was a careful investigation. The District was not required by Article XIX of the collective bargaining agreement to compel a production of a written statement before commencing an investigation. Ms. Kiser had until November 3, 2010, to provide any undisclosed information to the Board before it acted. The statements were all provided to Ms. Kiser before the Board hearing and she made no request to postpone the proceedings because of the alleged late receipt of the statements.

The District reiterates its position that the written statements of Student C and E are admissible as an exception to the hearsay rule. In any event, the drawing of an adverse inference against the District for failing to call these witnesses is inappropriate when the same witnesses are available to both sides. The Association wants the arbitrator to believe that only Ms. Kiser's testimony is credible. Of all of the witnesses, she is the one with the most incentive to fabricate her testimony. The Association's attempt to impeach Student A's mother's testimony with an error in her testimony six months later is not sufficient to do so. The Association's reliance on other witnesses is "negative evidence" and ordinarily is inadmissible.

Ms. Kiser admitted to an array of unauthorized physical contacts with students. Ms. Kiser ostensibly employed these techniques to deal with students who were up and restless and moving about by reason of their attention deficit hyperactive disorder or other disabilities. She chose to use these techniques instead of following the requirement that she reconvene a conference to redevelop an IEP plans or develop behavior intervention plans, Ms. Kiser chose to use "redirection" exerting firm pressure on the shoulder of students when seated to have them remain seated. Even though Ms. Kiser denies "pinching" Student A, she did testify that she "cupped" her hand over the shoulders and applied pressure to keep the student seated. Student A testified that the "pressure" left bruises and red marks on his shoulders. Those who were too restless to remain in their seats were grasped at the shoulders or wrist and upper arm

and moved back to their seats. There is no evidence that any of this restraint occurred during emergency circumstances or to prevent harm to another student. The students were handled physically in order to secure their compliance. Therefore, the admitted use of force to discipline these students was contrary to Sec. 118.31, Stats. Ms. Burgard testified that any physical contact with a student with disabilities as a means of controlling their behavior or securing compliance must be specifically authorized in the student's IEP. Physical contact of the type specified by Ms. Kiser was not so authorized. Ms. Burgard testified that the use of physical force of the type described by Ms. Kiser was a violation of the IEP of each student and a direct violation of the IDEA and Sec. 115.787, Stats.

Discharge is the only appropriate sanction. The Arbitrator should defer to the judgment of the Board of Education as to the appropriate penalty. Section 118.31(4), Stats, requires that the arbitrator defer to the "good faith" judgment of the School Board in determining that Ms. Kiser violated the statute. Alternatively, the just cause doctrine does not require that progressive discipline be applied in a rigid manner. Progressive discipline steps may be skipped in instances of serious conduct. The conduct in dispute is very serious. It is misconduct directed at particularly vulnerable students. She has prior discipline for failing to follow the IDEA. Ms. Kiser's conduct demonstrates that she "knew best" how to manage student behavior and did not have to be bound by the Board's policies and procedures. There is no basis to conclude that Ms. Kiser would not again resort to unauthorized physical force. Thus, there were no other options available to the District other than discharge. The Association has not alleged that Ms. Kiser was treated differently as to the use of force than any other teacher.

Contrary to the assertion in the Association's brief, Ms. Kiser did receive due process of law. Citing *GREEN V. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.*, 716 F.2D 1191 (CA 7, 1983), and *ROGERS V. NORFOLK SCHOOL BOARD*, 755 F.2D 1985 (CA 4, 1985), the Board's use therein of student statements to decide the issue of discharge for employee accused of sexual harassment of students was found to meet minimum standards of due process of law. Although Ms. Kiser complains that certain statements are hearsay and, therefore, inadmissible, she had adequate due process of law. The District's staff took ample care to insure that the statements received were accurate and not subject to improper influence. The District explained the students' accusations to Ms. Kiser during the investigation and their reasons for recommending her discharge. Ms. Kiser and her Association representative were given the opportunity to review the report of the investigation and to recommend changes. Similarly, the court in *PAPAPETROPOUROUS V. MILWAUKEE TRANSPORT SERVICES, INC.*, 795 F. 2D 591 (CA 7, 1986), cited with approval an arbitrator's decision to admit the testimony of a student as an excited utterance.

Association Reply²¹

The District's description of Ms. Kiser's actions is inconsistent with the record. For example, Student A changed his testimony from "slammed" his hand down to "pushed" his hand down. Student A's testimony is inconsistent and is, therefore, incredible. At first he claimed this happened very frequently then he said his hand was pushed to the desk "every now and then." The fact that it did not really hurt is that he testified that it only hurt "sometimes." It is not uncommon for students to describe something that is unpleasant as "hurting" when what is meant is that it is merely unpleasant. Student C did not testify and it is not possible to assess his credibility.

Student G did not claim that Ms. Kiser "dragged" her down the hall. The testimony mentions being "pulled." She also testified that although the teacher squeezed her hand, she was able to pull away and the teacher did not try to grasp her again. Student G said it hurt her "a little bit." There is no evidence of any physical injury where one surly should have been had she been forcefully pulled. In any event, when Student G resisted, Ms. Kiser let go. There was no complaint at the time. Even more objectionable is the District's assertion of an "admission" from Ms. Kiser because she was able to guess the identity of the student. Ms. Kiser could guess the student's identity from the nature of the student's conduct which was a recurring problem with her.

It is not uncommon for students to confuse discomfort with pain. There is no question that students who are being redirected without pain would have some level of discomfort because they can't follow their impulses. Similarly, it is not uncommon for students to think that a teacher got "mad" at them when they are being firmly, but calmly, reminded of the rules.

The arbitrator should also consider whether the students embellished their story because of the attention they got from the more alarming stories.

The District also embellished the issue with respect to Ms. Kiser guiding students back to their seat, etc. by holding their arm and touching their back. The testimony that she held the arms of students behind their back and pushed on their elbow is not credible.

The District's actions in embellishing its argument are extreme. The District ascribes Student A's acting out at home to Ms. Kiser's alleged behavior. However, this is too much of a stretch given that student's dismal home life. Other students describe her as "very sweet." No student would offer that description if she was as abusive as the District alleges.

²¹ The Association also argues that none of the hearsay exceptions cited by the District in the previous footnote apply.

The arbitrator is only charged with determining just cause and not compliance with the IDEA or state corporal punishment statutes. The District has attempted to obfuscate the issue with its assertions about these. The District also incorrectly suggests that the IDEA rules abrogate the rules of Sec. 118.31(3), Stats. The District also misinterprets IDEA rules regarding restraint. The IDEA does not address “restraint” in any relevant respect. The incidental and minor contact used by Ms. Kiser is not required to be documented in a student’s IEP. State law and regulations do not prohibit the incidental contact which Ms. Kiser used. Section 118.31(4), Stats, requires that District allow the use of reasonable and necessary force for certain purposes and that deference shall be given to reasonable, good faith judgments of the employee.

The circumstances cited by the District as prior discipline were unrelated minor technical infractions. The IDEA is complex and it is not uncommon for teachers to make honest mistakes or to have used their independent judgment in the students’ best interests. Further, some of the complexity occurs because of conflicts between “No Child Left Behind” requirements and the IDEA which was enacted at a different time.

The Association also alleges that District’s citations to arbitral case law are irrelevant and incorrect.

DISCUSSION

The District discharged Ms. Kiser for two main reasons. The main reason it discharged Ms. Kiser was for using improper restraint with Students A, B and C and G.²² The other reason was that Ms. Kiser failed to properly follow the IEP of various students.

In dealing with the main allegations, the District has heavily relied upon the fact that all three students made similar allegations in Ms. Horbas’ investigation under circumstances when they could not communicate with each other. It also relied upon the corroborating testimony of related circumstances from the mothers of Student A and Student B. In that regard, Ms. Burgard concluded that Ms. Kiser used physical force to hold each of the foregoing students, used physical force to restrict the movement of all or part of the body of each of the students, and used physical contact in violation of the IEP of Student B. The force was used to gain compliance with her instructions and not for any reason allowed by law or the District’s

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²² It discovered this allegation during the course of its investigation. The main allegations of improper restraint, however, relate to Students A, B, and C.

policy. It also concluded that Ms. Kiser used force prohibited under any circumstances. This included:

- Hyper-extending the elbow of each of the students by grabbing their wrist and at the same time pushing on the back of the arm to put painful stress; and
- Placing pressure on sensitive pressure points on of the wrist and/or neck area

I find that the District did not have just cause to discharge Ms. Kiser.

I. Standards

A. *Just cause*

The just cause doctrine is one of the most established doctrines in collective bargaining. It is common in most collective bargaining agreements. It provides for basic fairness in the discipline of employees.

The basic standards of the just cause doctrine are not significantly in dispute. Employees are entitled to know what is expected of them and a reasonable opportunity to comply.²³ Most arbitrators recognize that employers who believe that an employee may have engaged in misconduct are required by the just cause doctrine to give the employee notice of the charges against him or her and an adequate opportunity to explain himself or herself before he or she is disciplined.²⁴ In some cases, that concept is expressly stated in the collective bargaining agreement in addition to the “just cause” provision. If an employee is disciplined and the employee challenges the discipline, the District is required to demonstrate by at least a preponderance of the evidence that the employee engaged in the misconduct of which he or she is accused and that the penalty the District applied is reasonably related to the offense charged.²⁵

B. *District Policy 447.1 and IDEA Standards*

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²³ The quoted reference is from the National Academy of Arbitrators' *The Common Law of the Workplace*, Sec. 6.5, comment, p. 178 (BNA, 2d. Ed.)

²⁴ See, *Common Law*, Sec. 6.13

²⁵ See, *Common Law*, supra, Sec. 6.5 and 6.7. Wisconsin has established the burden of proof for violations of collective bargaining agreement as a “clear and satisfactory preponderance of the evidence” in Sec. 11.07, Stats. I apply that burden of proof herein.

Ms. Kiser received District Policy 447.1 and was aware of it at all times material to this dispute. The policy as stated applies to physical force applied to any student of the District, but does not specifically address special education under the IDEA. Ms. Burgard, Ms. Kiser's supervisor, administers the Board policy as it relates to special education. She testified that in the context of special education, the policy should be construed to be consistent with the more restrictive standards of the IDEA. The requirements of the IDEA further restrict the use of physical contact, including, but not limited to, the use of force with special education students. The policy is also intended to be consistent with the rights of teachers specified in Sec. 118.31, Stats. Accordingly, the principles of both the IDEA and Sec. 118.31, Stats, are controlling in this dispute. Ms. Kiser was aware of the IDEA standards, but was confused about Sec. 118.31.

I turn first to the IDEA. In regard to special education the general term "force" equates to the technical terms of "restraint" and "seclusion" as used in the special education field. Special education teachers are required by District Policy 447.1 to report the use of "force" as defined in the policy on a specific form. It is undisputed in this matter that Ms. Kiser did not make any report on that form and made no report of any other kind except to identify the October 12 incident in the District's investigation. The use of "restraint" or "seclusion" has been explained at length in the policies of the Wisconsin Department of Public Instruction. These policies were also provided to Ms. Kiser.

As it relates to this matter "restraint" is defined as:

Holding a student in order to restrain his/her movement; use of physical force, without the use of any device or materials to restrict the free movement of all or a portion of a student's body.

It does not include

- Comforting/calming a student,
- holding a student's hand or arm to escort when a student is complying
- intervening in a fight

Under this policy, "holding" alone may independently qualify as "restraint" and the use of physical force independently may qualify as "restraint."²⁶ There are some techniques and approaches in using restraint which are recognized as prohibited under any circumstances. As

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²⁶ Ex. 12

it relates to this dispute, any technique of “restraint” that uses “. . . pain inducement to obtain compliance or control, including . . . hyperextension of the joints, or extended use of pressure points for pain compliance” is prohibited under any circumstances.²⁷ An e-mail dated February 20, 2008, to Ms. Burgard from Wisconsin Council of Administrators of Special Services (herein “WCASS”) and forwarded to all special education teachers in the district provides:²⁸

In the past week DPI has had 2 calls regarding students being restrained in chairs without such procedure being identified through the parents or in the IEP. We suggest that you remind your staff that non emergency (sic) physical restraint should not be used unless the parents have been notified and included in the IEP for students with disabilities.

Special Education students are a particularly vulnerable population of students. They are given protection by the IDEA from physical contact which might otherwise be appropriate for other students. The District has the highest responsibility to protect these students. Some special education students are medically vulnerable to physical interaction. Some have strong psychological reactions to being touched. As a result, it is vital that that the use of physical contact, including, but not limited to, restraint be planned in advance and documented in a particular student’s IEP.²⁹ Ms. Burgard testified that it is never permissible to use physical force or physical contact to control a student if it is not pre-authorized in the student’s IEP.³⁰ Chapter 115, Stats, implements the IDEA in Wisconsin. Sections 115.78, et seq., Stats, apply to the development of IEP’s. Section 115.782 (4), Stat, requires that the IEP team re-evaluate a child when the child’s parent or teacher requests it. The re-evaluation may only be done after reasonable efforts to obtain the parent’s consent. Section 115.787(4), Stats, provides:

(c) After the annual individualized education program meeting for a school year, the entire individualized education program team may make changes to the

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²⁷ References to the exhibits at hearing are referred to as “ex. -.” See, ex. 13.

²⁸ Ex. 10

²⁹ Tr. 36-7

³⁰ Ms. Burgard later explained physical contact or restraint necessary for the safety of the student or other students need not be in the IEP. She also noted that a teacher may use reasonable and necessary force the first time a student acted out. Obviously, it would not be in the IEP. Once a teacher knows that a student needs physical intervention, the teacher should then call a review to revise the IEP. See, tr. pp. 130-3. As a practical matter, it may not always occur. For example, it may take some time to recognize why there has been a change and what is the best way to deal with it. In those circumstances, the best course is for the special education teacher to inform and involve the parent as quickly as possible. If this can’t be done, it would be wise for a special education teacher to involve his or her supervisor.

child's individualized education program, or the child's parent and the local educational agency may agree not to convene an individualized education program team meeting for the purpose of making changes to the child's individualized education program. If the child's parent and the local educational agency agree not to convene an individualized education program team meeting, they shall instead develop a written document to modify the child's current individualized education program. The local educational agency shall give the child's parent a copy of the child's revised individualized education program.

It is also undisputed in this matter that the use of physical contact between a special education teacher and a student may be required by the student's IEP as part of the student's right to have a "free and appropriate" educational program. Ms. Kiser testified to circumstances in which she has been required to use "restraint" and/or "seclusion" as part of students' IEP's when she worked at the elementary school. In that regard, she has had training in non-violent intervention techniques. In some cases, the District has had to call upon its employees to exercise the authority to deal with situations in which a regular education student is acting in a manner which is a danger to the student or others. In that regard, Ms. Kiser's principal at the elementary school ordinarily called upon her to use those techniques in the rare situations requiring a staff member to deal with students in that situation.

Physical contact not amounting to restraint is called "incidental" contact. As it relates to this dispute and examples of "incidental" contact include placing an open hand on a student's back and guiding him or her in a direction, a touch on the shoulder or lightly holding a student's hand to guide them from one place to the next. In each of those examples, the student is free to pull away and move any part of his or her body. As it relates to this dispute, "incidental" contact is of two types. The first type is contact which is essentially positive reinforcement such as a "high five." The other type is contact which is really corrective such as guiding a student away from something the student wants to do, but which is not appropriate. Ordinarily, incidental contact is not documented in an IEP, but an IEP might prohibit or restrict it. There may be circumstances in which regular incidental contact should be documented in an IEP.

The needs of special education students and/or the efficacy of various special education techniques can change. One of the main skills of a special education teacher is to recognize these changes and develop new approaches to deal with them. In some of those situations it may take some evaluation or experimentation to identify the changes or new techniques.

I turn to Sec. 118.31, and its interrelationship with the IDEA. Section 118.31, Stats, deals with the use of force in schools as it applies to all students. It requires all school boards to adopt board policies to allow teachers to use "reasonable and necessary" force to, among other things, prevent an act that threatens physical injury to any person, self-defense of the

teacher, defense of others, to prevent a pupil from inflicting harm to himself or herself, or to protect the safety of others. It also requires that school boards allow teachers to use “incidental, minor or reasonable physical contact designed to maintain order and control.” The statute further provides that the prohibited actions thereunder does not include actions which are “consistent with an individualized educational program” developed under Sec. 115.87, Stats. The parties agree that policy 447.1 is intended to incorporate the rights specified under Sec. 118.31, Stats.

It is generally recognized in the special education field that those exceptions must be viewed restrictively in the context of objectives of the IDEA.³¹ Although Sec. 118.31, Stats, requires that a school district allow employees to use the above authority, teachers should use that authority only as a last resort and then only with caution. DPI guidelines that pre-date the more detailed guidelines succinctly summarize situations involving the use of “restraint” and “seclusion” in special education as follows:

Controversy surrounds the use of seclusion and physical restraint in school-based programs, and use of these interventions carries a high degree of risk for being misunderstood. Both techniques should be used only as a last resort in case of danger to the student and/or others. The immediate goals of seclusion and physical restraint are to defuse dangerous situations, protect the student and others from injury, and regain a safe, controlled, productive learning environment.

School personnel should be proactive when considering the use of either technique, and there should be planning and procedures in place in the event either becomes necessary for safety and maintaining a productive learning environment. . . .

II. ALLEGATIONS OF STUDENTS A, B AND C AND PARENTS

I turn now to the main reasons that the District discharged Ms. Kiser, the allegations of Students A, B and C.

A. Summary of Allegations and Ms. Kiser’s Response

1. *Student A’s Testimony*

Student A made the most serious of the allegations about Ms. Kiser. He said the disputed conduct occurred primarily in the sustained silent reading class in Ms. Kiser’s classroom right after lunch. He had three main allegations of improper physical contact. He

³¹ Ex. 12

essentially recounted that Ms. Kiser frequently “screamed” at him (was angry with him). He recounted that Ms. Kiser would put both hands on his shoulders near the nape of his neck and push down hard. At the same time she would squeeze rather hard and cause pain (“pinch”) at the sensitive pressure points of his neck. He inferred that she did this to get him to remain in his seat. He also recounted that when he was out of his seat she would grab him by the wrist and push on his elbow to force him to return to his seat. Finally, he indicated that there were times that she would either remove or put a pencil in his hand and slam the hand down to the desk, making a sound as it struck. The first two situations caused him significant pain. The third was not painful. He indicated that this behavior started about two weeks into the school year and was repeated frequently.³² He became afraid of Ms. Kiser. He started feigning illness to go home early from school, primarily before the afternoon classes started. He went home on October 12 before lunch because he was afraid of Ms. Kiser. He complained to his mother of pain in his shoulders at his neck. She viewed red marks which a few days later turned to bruises. He refused to go to school on October 14 and he and his mother came in and complained that morning as noted above.

2. Student A’s Mother’s Testimony

Student A’s mother testified as follows. Student A responds poorly to being spanked, to being the object of physical aggression, and to attempts to redirect him by using violence.³³ Student A was looking forward to being in middle school. In the first few weeks he loved school. His behavior changed about two weeks after school started.³⁴ Student A started displaying signs of depression. He stopped wanting to be with friends and would come home and just sleep. He also started acting out his frustrations. He started abusing his pets. After her son revealed what was happening, she concluded that Ms. Kiser’s behavior was the “trigger” for all of this.³⁵ She also noted that after Ms. Kiser was replaced with another teacher, the situation got better, but then got worse.

She noticed very small “angry red” marks on his shoulders, but could not identify where they came from. She suspected others outside of school of abusing Student A, but could not come up with an explanation. Then in October, about two weeks before October 14th (when she and Student A complained at the school), Student A began relating small bits of specific complaints. In mid-October, he finally told her that Ms. Kiser was, among other

³² Tr. pp. 199, 205

³³ This information is not in Student A’s IEP, Ex 15. See, tr. p. 146.

³⁴ T. pp. 148-151

³⁵ Tr. p. 162

allegations, grabbing him by the wrist, pinching his shoulders and grabbing his hand. He said he wanted to kill Ms. Kiser. He saw her do the same to Student B. At that time, Student A told her that the “angry red” marks she saw had been inflicted by Ms. Kiser. He said that she did similar things to Student DG. It was worse after lunch. He tried to do things to distract Ms. Kiser’s attention from those other students so that they would not get hurt. On October 14th, she decided to go into school as specified above.

3. Student B’s Testimony

Student B also made complaints in the ensuing investigation which he affirmed in his testimony. Student B’s chief complaint was that Ms. Kiser on one, maybe two, occasions “rocked” him back and forth. This did not hurt him, but it did make him very angry. It made him so angry that he wanted to hit her. He restrained himself. He also claimed that Ms. Kiser “pinched” his shoulders on one or two occasions.³⁶ At other points, he suggested this might have been more frequent. His other major claim was that on one or two occasions, Ms. Kiser picked up a pencil, put it in his hand and then somewhat forcefully slammed the hand down so that it made a sound when it hit the desk. He also said that he saw Ms. Kiser “pinch” the shoulders of Student A. Student B also indicated that he has a low pain threshold which means that he is very sensitive to pain.

4. Student B’s Mother’s Testimony³⁷

Student B’s mother testified as follows.³⁸ Student B has a communication problem. He does not correctly interpret people’s physical behavior or verbal joking toward him. When her son gets frustrated he becomes angry.

As it relates to the allegations of physical abuse, Student B’s mother testified that Student B was very excited about starting middle school. However, after the first two weeks that attitude changed very fast. Student B, like Student A, started calling and saying he was sick and wanted to go home before lunch. His frustration with school remained very high even after Ms. Kiser was replaced; however, very significantly after Ms. Kiser was replaced Student B began working with a male teacher from the high school. Student B is allowed to work with this teacher when his behavior is good and Student B looks forward to working with him. Nonetheless, Student B’s frustration with school remains high.³⁹

³⁶ See tr. p. 240.

³⁷ Student B’s mother also complained that Ms. Kiser did not establish a “safe spot” for Student B and practice with Student B going to that spot when he felt he was losing his temper. This allegation is discussed below.

³⁸ Tr. pp. 270, 279-80

³⁹ Tr. pp. 273-75

Student B complained to her on one occasion that Ms. Kiser would take his hand and try to get him to write. Student B also complained that Ms. Kiser came up behind him and “rocked” him from side to side. Ms. McKernan-Zunker, a teacher who witnessed the event, also called her that same day and reported that Ms. Kiser had come up behind Student B and rocked him back and forth gently. This incident occurred in early October.⁴⁰

5. Student C’s Statements

Student C did not testify in this proceeding. He did make a written complaint during the investigation and orally supplemented it during the investigation. He wrote a statement which effectively alleges that when Ms. Kiser gets “mad” she would grab him in a violent way which made him afraid. He also noted that she pinched him on the shoulder when she was mad. He demonstrated being pulled by the arm and having Ms. Kiser push on the back of his arm. Both Mr. Nell and Ms. Horbas testified as to Student C’s demonstrations of specifically how Ms. Kiser “squeezed” his neck and shoulders. He also said that he saw Ms. Kiser pull on Student A’s arm when he was at a map one day.⁴¹

6. Ms. Kiser’s Response

Ms. Kiser admitted to using “incidental contact” with students on her caseload as was necessary to appropriately intervene when students do not or cannot respond to verbal instructions. She has been trained to use non-violent forceful interventions where they are required by the IEP of students or when she must intervene to protect a student from himself or herself or to protect others. When non-physical efforts are not successful and she deems some physical intervention appropriate, she uses the four forms of contact which are the subject of dispute. She has trained herself to use open hands. She does not use any form of incidental physical contact with students which she believes the student would not accept. She testified that on some occasions she “guides” students by holding them lightly by the wrist and placing an open hand on the back of the student.⁴² She used this technique with Student A numerous times.⁴³ She also acknowledged that she did place her hands on the shoulders of Students A and B on occasions with the hand open but pressing down gently on the shoulders to remind

⁴⁰ Tr. p. 276

⁴¹ See, Ms. Horbas, tr. p. 500 and Mr. Nell tr. p. 325.

⁴² See, for example, tr. p. 638-41, 857.

⁴³ Tr. p. 664-672, 684-5

them to stay seated.⁴⁴ She also acknowledged taking a pencil out of the hand of Student A.⁴⁵ She also used her hands on the hands of Student B to guide him to being on-task, and used this technique infrequently with other students.⁴⁶ She denied grabbing Student C's arm with the possible exception of one incident when he was inappropriately passing out pencils in order to get him to his seat.⁴⁷ She also noted that she did not view a brief moment when the student is restrained as "restraint" within the meaning of applicable rules as long as the student ultimately could pull away and the situation did not involve pain.⁴⁸ She noted that when she put her hands around Student A's shoulders, she did not view it as immobilizing him to momentarily prevent him from getting up because he was free to get up right afterward.⁴⁹

Ms. Kiser noted that teachers who deal with autistic children are constantly seeking new ideas to try out. Techniques that work with autistic children only work for a while.

Ms. Kiser testified that she was very firm with the students in dispute. She insisted that they engage only in appropriate tasks. She used her expressions of disapproval to keep them on task.⁵⁰ She noted that in her caseload, it was somewhat a routine matter that students would be up and down, and in the middle of the classroom. She noted that she intervened on a routine basis when student behaviors of that type are inappropriate or dangerous.

She also described an unusual event which occurred in her class in the morning (well before lunch) on October 12, two days before Student A came into school with his mother, in which she had to physically intervene to protect the safety of Student C.⁵¹ Student C was sitting at his table. It was Student C's habit to rock back in his chair and sit with the chair balanced on two legs. Student A was out of his seat when he should not have been and wandered over to Student C. The two had a table between them. Student A initiated what was an increasingly aggressive shoving match in which Student A was shoving the table toward Student C and Student C was trying to push the table away. This was while Student C was

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⁴⁴ Technique described more at tr. 719-20. At page 719, she indicated that at times her hands were cupped on each shoulder and that she applied mild pressure on the shoulders for students to sit down.

⁴⁵ Tr. p. 675

⁴⁶ Tr. p. 681-2

⁴⁷ Tr. pp. 685-6

⁴⁸ Tr. 707-709, 723

⁴⁹ Tr. p. 944

⁵⁰ Tr. p. 674

⁵¹ Tr. 665, 670

using the table for support while balancing the chair on the back two legs.⁵² She asked Student A to return to his seat, but the two students were too engaged to respond to verbal commands from Ms. Kiser. She guided him to his seat using incidental contact to the wrist and back. She did acknowledge that she may have placed the other hand either in the small of the back or on the shoulder.⁵³ She denied using any force sufficient to cause injury. She believes she talked to Student A after redirecting him to his seat and did place her hands on his shoulders to remind him to stay in his seat. She admitted that she may have grabbed Student A's arm during this incident to get him back to his seat.⁵⁴ She acknowledged that there may have been times when she put her hands on A's shoulders to tell him to keep in his seat without using any significant pressure, but believed that it did not occur on October 12.⁵⁵

She also recalled another incident.⁵⁶ Student C came late to the class room while the class was in the midst of reviewing a math lesson. He started passing out markers to each of the students. However, those materials were not appropriate to the day's lesson. Ms. Kiser went behind him and collected the markers from students and put pencils back in their hands. She could not identify specifically when this incident occurred.

She also recalled rocking Student B.⁵⁷ She described Student B as very lethargic. She did this because he was apparently sleeping at a computer when he was supposed to be moving between classes and he did not respond to verbal prompts or noise she deliberately made near him. She did express anger to him. She noted that Student B is substantially bigger and heavier than she and that she did not move him much. She viewed him as slightly annoyed, but not angry. She denied ever having the need to push on Student B's shoulders because he is lethargic and does not get up and wander around the room.⁵⁸

She acknowledged that she may have taken Student C's arm when he was improperly passing out materials, but denied ever pushing him down in his seat.⁵⁹

⁵² This was a regular compulsive habit of Student C.

⁵³ Tr. p. 718

⁵⁴ Tr. p. 683

⁵⁵ Tr. p. 684

⁵⁶ Tr. p. 669-72 Student C also recalled this incident. See, tr. 936

⁵⁷ Tr. p. 676-80

⁵⁸ Tr. p. 685

⁵⁹ Tr. p. 685-6

I conclude that Ms. Kiser was attempting to be truthful in every way. Nonetheless, there are errors in her testimony. She answered questions very forthrightly. She continuously demonstrated empathy for all of her students including the accusers. Her descriptions of events are consistent with all of the facts. They are corroborated to a significant extent by her communications while the disputed events were unfolding. It would be impossible for her to have fabricated her explanations solely for the hearing herein.

B. Analysis

1. October 12 Incident

It is difficult to reconcile the testimony of all of these witnesses. Therefore, it is best to start with the major incidents which were most fresh in the minds of the witnesses and to which there were corroborating witnesses. I start with the incident of October 12. This incident is important in a number of ways. First, it was the incident which precipitated Student A's refusing to go to school two days later. Second, it was fresh in the students' minds when they were interviewed. It was their perceptions of this incident which heavily influenced the way they perceived their relationship with Ms. Kiser and what they reported in the investigation. Third, this is an incident which Ms. Kiser acknowledges occurred.

Student F is the only actual non-participating witness as to what happened that day. He testified honestly. There were mistakes in his testimony which would occur with any child witness observing a startling event. I conclude that his testimony references the events alluded to by Ms. Kiser as occurring on October 12. He testified as follows. He faces away from Students A, B and C. He did not see a tussle between Student A and C as reported by Ms. Kiser. At first he testified that he saw Ms. Kiser grab Students A, B and C's wrists on a "couple" of occasions and force them back into their chair. He did not hear her say anything before she did that. He noted that one student was forced into his chair so hard that he tilted back in it. He did not know why Ms. Kiser did this.⁶⁰ He never saw Ms. Kiser pinch any of the boys on the shoulder on this day or at any time,⁶¹ but did recount that she pushed them down in the seat apparently as part of the arm-pulling.⁶² On further examination he stated that he turned and looked the first time when they "needed help." It is unclear what he meant by "help." It was unclear if it was "help" with their work or "help" because of an incident.⁶³

⁶⁰ Tr. pp. 289-92

⁶¹ He did recount seeing her shout at "them" on occasions to "sit down" and then push them down in their seats. See, tr. pp. 294, 299. This testimony relates to taking students by the arm and returning them to their seats. It does not refer to pushing down on their shoulders while seated. See, also tr. p. 295.

⁶²Tr. pp. 289, 296

⁶³ Tr. p. 299

He was attracted to the situation by the commotion and Ms. Kiser saying “angry” words like “Sit down.” She then came up to them to push them down in their chairs.⁶⁴ He said that he really did not know whether or not Students A, B and/or C were doing anything bad to prompt Ms. Kiser’s actions. I conclude that Student F had no fear of Ms. Kiser⁶⁵ and the tenor of his testimony was that the negative interaction between Ms. Kiser and Students A, B and C was prompted by the students’ misbehavior.

There are mistakes in Student F’s testimony. Although Student F reported seeing Ms. Kiser pull Student B by the arm, Student B has not made any complaint that she ever did so. Student F is mistaken as to the order of some events. Other errors are noted below.

I conclude that Ms. Kiser’s recitation of the events of that day is generally correct. I conclude that Student A and Student C started a tussle over the table which escalated. This started while Student C was rocked back in his chair. Student C habitually rocks back in his chair and normally stays in that position. He either stayed in that position or continued to rock his chair during it. The situation represented a risk of serious head injury to Student C if he fell over. Ms. Kiser attempted to use non-physical means to get them to disengage, but the dispute, instead, escalated to a hostile situation. Ms. Kiser shouted to Student A to “sit down,” but Student A failed to pay attention. Ms. Kiser took Student A by the wrist and directed him to his chair.

I conclude that Ms. Kiser never forced back the arm of a student and applied pressure to the elbow in the wrong direction to Student A or any other student. I note that Ms. Kiser acknowledges “leading” students gently by the wrist and open handed pressure on the back. Other evidence with respect to Student G indicates that Ms. Kiser also grabs students by the bicep at times. She has acknowledged “leading” students by the hand while holding their arm on occasions.⁶⁶ Cynthia Canter was a paraprofessional for the District for 11 years. She had a special education teaching license, but worked as a paraprofessional. She worked closely with Ms. Kiser for seven years, including one year while Ms. Kiser was at the middle school. She stated that Ms. Kiser was an avid student advocate, that Ms. Kiser wanted the best for her students, that Ms. Kiser was patient and positive with special education students. She recalled that Ms. Kiser had worked well with a particularly disruptive student who “pushed every button.” Ms. Canter never observed Ms. Kiser be physically rough with any student.⁶⁷ It is

⁶⁴ Tr. pp. 299-300

⁶⁵ Other than he did not want to get in a situation such as the October 12th

⁶⁶ Compare, tr. pp. 638-640 to tr. p. 718-9

⁶⁷ See, tr. pp. 432-5.

entirely out of her character for Ms. Kiser to have ever intentionally applied pressure to an elbow the wrong way. There is no direct testimony as to the “non-violent” intervention methods Ms. Kiser was taught. It is not likely Ms. Kiser would have done this to Student B who is bigger than she is.⁶⁸ It is also not likely she would have done this to his friends for the same reason. It is more likely that Ms. Kiser intended to stabilize her grip in some situations by grabbing a bicep as well as a wrist. The purpose would have been to avoid injury to the student. In summary, she did take Student A forcefully by the arm and physically required him to return to his seat. However, she did not do this using pressure against the elbow.

It is important to note that Student F stated that he saw Ms. Kiser lead Student C by the arm as well. This is consistent with Student C’s written statement and verbal statements to Ms. Horbas and Mr. Nell. This could only have occurred if Student C were out of his chair. Ms. Kiser did forcefully return Student C to his chair as she did with Student A. Student F viewed Ms. Kiser as using force in such a manner as to have a student rock back in his chair when she forcefully seated him. I am satisfied that this observation was Student C merely returning to his habitual position.

Student A’s testimony is that one of the “neck pinching” episodes occurred in the October 12 incident.⁶⁹ This is a situation in which Ms. Kiser did use force on Student A’s shoulders to prevent him from resuming the tussle. It is not believable that Ms. Kiser used enough force to create “angry red marks” or bruises without Student A having obviously cried out in pain. He did not do so.

The evidence is less sure with respect to Student C having had any pressure applied to his shoulders and/or neck. If Student C got up as noted above, it is likely that Ms. Kiser again cautioned Student C to remain in his seat. For the reasons discussed more below, I conclude that Student C’s hearsay statements are not reliable. Student C’s description to the District’s investigators that Ms. Kiser used any force on his neck or shoulders to restraint him is not believable.

I also conclude that Ms. Kiser acted to separate Student A and Student C to prevent potential injury to Student C and to end the escalation. After she separated them she acted to prevent a reoccurrence of the escalation. Ms. Kiser took immediate action to prevent injury to Student C and to preserve the order of her class under a circumstance which might lead to injury. This is specifically exempted by District Policy 447.1 and Sec. 118.31, Stats. It was not inconsistent with the IEP of either student. I note that Ms. Kiser did not report this

⁶⁸ I note that Student B demonstrated in his testimony tremendous progress in understanding his emotions and learning to control them. Nothing herein is meant to denigrate the efforts he has made and the growth he has achieved.

⁶⁹ Tr. 207-9

incident on the form used in special education for reporting incidents of this nature. She was suspended on October 14 and, therefore, did not have sufficient time to do so. She did disclose the incident when interviewed by the District. She did not violate District Policy 447.1 in any manner with respect to this incident. The District does not have just cause to discipline her for this incident.

2. Student B's Allegations

I turn now to Student B's testimony. Student B's chief complaint was the rocking incident. Ms. Kiser acknowledged it occurred and Ms. McKernan-Zunker witnessed it. Student B testified that Ms. Kiser came up from behind him and "pinched" his shoulders really hard and then rocked him back and forth. Ms. McKernan-Zunker specializes in speech pathology and regularly works with special education students. She and Ms. Kiser generally corroborated each other as to what physically took place. She testified as follows. Student B was resisting working by laying his head down and pretending to sleep. This was one of his customary work-avoidance routines. Ms. Kiser tried to get him to focus on classwork by verbal prompts and by physical proximity (moving close by him). None of these proved successful in producing any change. The first contact Ms. Kiser had was to place one hand on the side of each of Student B's arms at the shoulder level. She then pushed him from side-to-side in a rocking motion for several times. This lasted for a second or two. Ms. McKernan-Zunker took this to be an "incidental contact" tactile prompt which is within the range of "incidental contact," as that term is used in the special education field. Both Ms. McKernan-Zunker and Student B indicate that he became furious at this move.⁷⁰ Ms. Kiser later in her testimony acknowledged that Student B was "mildly upset" and asked her to stop. She indicated that she then immediately stopped. Ms. McKernan-Zunker called Student B's mother that evening to tell her what had occurred. In short, Ms. McKernan-Zunker, in her professional judgment, thought that Ms. Kiser should not have used that form of intervention with that student, but that Ms. Kiser was not being physically abusive in doing so. Student B has difficulty with being touched, misperceives the intentions of others and he has anger management issues. The District concluded that the rocking technique was "restraint" and also was inappropriate because it violated the Student's IEP.

I conclude that Ms. Kiser used this technique with Student B only on this occasion. I also conclude that this approach is ordinarily "incidental" contact which is not prohibited by District Policy 447.1 as it applies in special education. Student B's IEP, Section I-5 notes that he has an expressive and receptive language delay. This requires giving him short instructions and giving him time to respond. The testimony indicates that Ms. Kiser did precisely that before initiating this intervention. His IEP, Section I-6 sets a goal of working independently

⁷⁰ Tr. pp. 395-9

75% of the time. Ms. Kiser chose the tactile prompt to reaffirm that goal and because she wanted to avoid disturbing other students in the library setting.

The tactile prompt is not precluded by Student B's IEP unless Ms. Kiser knew or should have known either that it was unwanted or was likely to be misunderstood. It is not at all clear that Ms. Kiser should have believed that the tactile prompt was unwanted at the time it was initiated or necessarily would have been misunderstood. It is clear that this approach turned out to be unwanted by the student and Ms. Kiser stopped immediately when the student objected. She never tried it again. That judgment is one which Ms. Kiser could rightfully make based upon her honest perceptions of Student B's interactions with her. I conclude that the District has failed to show that this was a violation of its policies.

Student B also has complained about the "hand-slamming."⁷¹ Ms. Kiser describes Student B as a very lethargic student who often refuses to do anything. It was not her practice to reposition his hands. She recalls that there were rare occasions when she re-positioned Student B's hands. Student B testified that Ms. Kiser, on one or two occasions, picked up a pencil and put it in his hands and slammed it down on the table "kind-of-hard."⁷² Generally, Student B is not good at inferring a person's intentions from their actions. In this case, he did recognize that Ms. Kiser was trying to get him to work.⁷³ He inferred that she intended to "slam" his hand; however, his other descriptions suggest that the better view is that Ms. Kiser did not intentionally force his hand down with an intention of causing pain. He heard a noise when his hand went down. This startled him. However, he experienced no pain. The evidence is insufficient to conclude the extent to which the force which caused the noise was exerted by Ms. Kiser rather than Student B's reaction. In short, this conduct was minor error which could occur in any contact between humans in close proximity. This occurred on at-most two occasions and is well within the range of "incidental contact."

As noted above, Student B alleged that Ms. Kiser "pinched" his shoulders by putting one hand on each shoulder and squeezing.⁷⁴ This is akin to the same description as the other boys. As noted above, he stated that this occurred one or two times, but later said this was a weekly occurrence. The one time he could identify it as having occurred is the time of the "rocking" incident above. It important to note that Ms. McKernan-Zunker would have witnessed Ms. Kiser "squeeze" Student B's neck had it occurred. I conclude that it did not

⁷¹ He places at least one occasion on October 12. See, tr. p. 266.

⁷² Tr. pp. 232-235, 243

⁷³ Tr. p. 254

⁷⁴ Tr. pp. 239-40, 242-3, 252-3, 265

occur at that time. The only place he specifically described this occurring at any other time was in the library with other students and adults around. This is exceedingly unlikely. Ms. Kiser conceded that had the behavior occurred as described by the students, it would have been prohibited. If she had done this, she would not have done this where other staff could see her do it.

Student B has frequently told stories which distort reality.⁷⁵ Student B is close friends with Student A.⁷⁶ Student B denied discussing these events with anyone.⁷⁷ Student A contradicted this. He said they frequently discussed these events in detail.⁷⁸ Student B's testimony was embellished by what Student A told him, including, but not limited to, Student A's description of the "neck pinching" to Student B and C. Student B testified that he saw Student A rocked by Ms. Kiser in the same way Student B was rocked.⁷⁹ Student A never complained of being rocked by Ms. Kiser and Ms. Kiser would have had no reason to have done so. This and other testimony indicates the identification between the two and their empathetic processes. Student B is lethargic except when losing his temper. Ms. Kiser would have no reason to "pinch" Student B's shoulders. Student B's reporting of the frequency of the "neck pinching" at first as once or twice only and later as weekly is not believable. This is true because Student B's primary concern has been the rocking incident. If it were that frequent and that painful it would have been his highest concern. He never told his mother about "neck pinching,"⁸⁰ even though he told her about the other complaints as they occurred. Student B's reporting of when and where the "neck pinching" occurred is also not reliable. He claimed it was in the library when other adults were around. Ms. Kiser knew that this would have been inappropriate behavior and would not have intentionally done so with others around.

Other evidence tends to indicate that Student B was so heavily influenced by his friend Student A that he mimicked his attitude and behavior. Student B's mother testified that Student B was happy about school until about two weeks into new school year. His attitude changed and he started avoiding school at that time, feigning illness. This is the same timing in which Student A started doing the same behavior and expressing his displeasure with Ms. Kiser. The conduct of which Student B primarily complained, the rocking incident, happened much later,

⁷⁵ Tr. p. 403

⁷⁶ Tr. p. 251

⁷⁷ Tr. p. 262

⁷⁸ Tr. pp. 203-4

⁷⁹ Tr. pp. 242-4

⁸⁰ Tr. 275-6

in early October. Student B's discussion of the "hand slamming" makes it highly unlikely that that incident was a basis for his avoiding school.

Accordingly, I conclude that the preponderance of the evidence is that Ms. Kiser rarely placed her hands on Student B's shoulders in the open handed manner she described, but when she did so she never placed any significant pressure on Student B's neck or shoulders.

3. Student C's Allegations

I turn now to the statements Student C provided to the District in the investigation. The determinative issue with respect to Student C is whether his hearsay statements were and are sufficiently reliable to support discipline on the bases in dispute herein. I conclude they are not. First, it is unclear whether Student C's statement relates to anything other than the October 12 incident. In any event, Student C's IEP indicates that he has some difficulty understanding difficult social situations and, thus, his perception of Ms. Kiser's intent is suspect. Student A and C are friends. As noted above, Student A has frequently remonstrated to the others about his complaints about Ms. Kiser and demonstrated his physical complaints to them. As noted above, Student B was heavily influenced by Student A and it is equally possible that Student C was as well. Accordingly, Student C's statements are not reliable for the purposes of this dispute. Therefore, his complaint does not justify the imposition of discipline.

4. Student A's Allegations

The main thrust of the claims against Ms. Kiser comes from Student A. Ms. Kiser acknowledges having physical contact with Student A, but the two disagree about specifics. He makes the three main allegations of physical contact specified above; namely:

1. Ms. Kiser frequently "pinched his neck" while pushing down on his shoulders,
2. She would grab him by the wrist and put him back in his seat by pushing on his elbow
3. She slammed his hand down on occasions.

I conclude for the same reasons as discussed above for Student B that the allegations about "hand-slamming" in fact did not involve pain or significantly restricting the movement of any part of Student A's body. They were appropriate incidental contact.

Student A's allegation that Ms. Kiser took his arm and forced his elbow in the wrong direction, is without merit. Similarly, it is not believable that Ms. Kiser ever deliberately used a pressure point in the wrist to hold Student A. It is undisputed that Ms. Kiser frequently took Student A by the arm and led him back to his seat. Student A was in the habit of complying with Ms. Kiser when she did so, even if he was privately resentful. It was reasonable for her to expect him to comply on October 12th as well. He was free to pull away. Escorting a student when a student is complying is specifically exempted from the definition of "restraint." The fact that Ms. Kiser momentarily prevented Student A from moving a part of his body when Ms. Kiser undertook to escort him does not make the conduct "restraint" when, as here, Ms. Kiser had a reasonable expectation that Student A would comply.

There is substantial merit to the "neck pinching" complaints leveled by Student A. However, his version of the events is not entirely persuasive.

Student A's testimony has to be reviewed by keeping in mind the serious issues about Student A's credibility even when he tries to tell the truth. The main issue with Student A's credibility is that Student A does not understand his own extreme avoidance behavior and, therefore, cannot take responsibility for it.⁸¹ He cannot accurately explain how his motives or behavior might be involved in the facts he testified to. He cannot accurately ascertain why Ms. Kiser may have done something.

To the extent that Student A has engaged in intentional misbehavior, he tries to conceal it from his mother. Ms. King, Student A's fifth grade special education teacher stated that Student A's avoidance behavior had reached the level that he was hiding his home work from his mother and lying to her about not having homework. In school, he simply refused to do any work. He needed special education in all areas mainly just to get him to do something. In this regard, every statement he made in this dispute was in front of his mother. To the extent that he does recognize that he engaged in misconduct, he wanted to avoid revealing that in front of his mother.

Another factor is simply Student A's youth. He has been asked to describe situations with multiple variables and circumstances. Even an adult has trouble trying to do that succinctly.

The real reason that Student A wanted to avoid SSR with Ms. Kiser is that Ms. Kiser used the time to attempt to achieve his IEP goal of sustained, focused work for at least 10 minutes at a time. In this regard she chose to use a corrective approach rather than a solely "positive" encouragement approach. In this regard, all of the students in that SSR class

⁸¹ See, for example tr. p. 188.

reported that Ms. Kiser was “yelling” at Students A, B and possibly C all the time.⁸² It is at this time that Student A started feigning illness and skipping out of school. This was easy for him to do on a regular basis until about mid-October. The attendance officials started questioning his absences in mid-October. In this regard, it is obvious that Student A had ample motivation to view Ms. Kiser as the “cause” of his avoidance for reasons other than the allegations in dispute. The evidence also suggests that he viewed avoiding the SSR class as a power struggle between the two of them.⁸³

I turn now to the neck “pinching” allegation. The direct evidence supports the view that Student A’s explanation of events is not entirely persuasive. Student A’s own recitation of specific events in which Ms. Kiser “pinched” his shoulders was implausible or very incomplete.⁸⁴ Student A describes Ms. Kiser as “pinching” his shoulders on three occasions after he was already well out of his chair. He testified that sometimes she did this to keep him in his chair and sometimes she did this to make him go back to his chair. It is very unlikely Ms. Kiser would have “pinched” his shoulders when he was out of his chair and more likely she would have “guided” him. “Guiding” involved his arm and, at most, one shoulder. None of the independent student witnesses ever reported Ms. Kiser using his neck and shoulders to force him back to his chair. Further, the incidents he describes as triggers for “neck pinching” were habitual avoidance routines for him. Those are situations in which Ms. Kiser handles in routine ways. I note to the extent that they were not normal habitual avoidance routines, but situations more like the October 12 incident, it is possible that Ms. Kiser used contact with his shoulders to keep him in his seat after the incident.

Other evidence indicates that Student A’s testimony is unreliable. Student A also said that he saw Ms. Kiser “pinch” the shoulders of Student B. However, this is inaccurate.⁸⁵ The incident he referred to was actually when Ms. Kiser “rocked” Student B. Ms. Kiser did not “pinch” Student B’s shoulders.

I turn to the allegations that Ms. Kiser grabbed Student A by the arm and forcefully returned him to his seat on occasions other than October 12. The undisputed evidence is that

⁸²I conclude that what is meant by “yelling” is that Ms. Kiser used verbal disapproval and prompts almost continuously with Student A to stay in his seat and to continuously focus on his assigned task. In most cases she did not raise her voice, but in those circumstances when his conduct disrupted the class or was highly inappropriate she did raise her voice.

⁸³ He admitted to his mother that he found reasons to intentionally try to disrupt the class. See, tr. p. 158. His statement to her was an admission against his interest.

⁸⁴ See, tr. pp. 191-2.

⁸⁵ See, tr. p. 192-3.

Ms. Kiser did lead Student A back to his seat by the arm many times. Other than October 12, Student A was ordinarily free to pull away. The foregoing was incidental contact. There were a few occasions when Student A was momentarily not free to pull away. Ms. Kiser acted on those occasions to either protect Student A or others from immediate injury⁸⁶ or to maintain order and control of her classroom. Each of those situations was intended to allow Student A to recognize his own behavior and voluntarily return to his seat. Ms. Kiser credibly testified that in each of those situations it was her expectation that Student A would voluntarily comply. For the purposes of this matter Student A did voluntarily comply within a moment to all of these interventions. Student A never voiced any request to stop this. Ms. Kiser did not receive any feedback that would indicate that this was a problem. In the context of this dispute, the foregoing remained incidental contact.

I turn now to the most serious allegation Student A made which concerns the “neck pinching.” I conclude that there is merit to this allegation, but that it is highly overstated.

The major corroborating evidence is the testimony by Student A’s mother about finding small “angry red marks” on Student A and both witnesses’ correlation of that to Ms. Kiser’s conduct. I conclude that they do not correlate to the facts of this case. Student A carries a back pack.⁸⁷ It is more likely the small “angry red marks” relate to the back pack and the fact that by his mother’s description Student A is a very active boy than they do to Ms. Kiser’s conduct. Student A and fellow students were playing the “cheese” game, which was a form of tag during this period. Student A’s mother emphasized that these marks were very small. It more likely they relate to chaffing. It is virtually impossible that Ms. Kiser could inflict those long-lasting marks with finger pressure without Student A’s crying out in pain so loudly that at least other students in the room would know about it.⁸⁸

Still, it is highly unlikely that he could have described the “neck pinching” without having experienced it. The overall course of Student A’s reaction makes it likely that he did experience it from Ms. Kiser. Ms. Kiser’s own explanation of the variations in the way she applied using her hands on Student A’s shoulders suggests that on some occasions she was more forceful than others and may have unwittingly caused some pain on some few occasions. I conclude that she did not intentionally use pain to Student A’s shoulders, but that on two or three occasions other than October 12 she did inadvertently cause the “pinching” sensation. Student A describes one of these occurring about two weeks into the school year. The combination of relatively frequent light touches to the shoulders interspersed with some

⁸⁶ As in the October 12th incident

⁸⁷ Ex 64

⁸⁸ It is conceivable, but far less likely that Ms. Kiser inadvertently scratched Student A’s shoulders with her fingernails on some occasions in a way which Student A did not immediately perceive.

instances of painful contact does explain why Student A would build fear and resentment during this period.

I conclude that other than the October 12 situation and the two or three situations described above, the contact between Ms. Kiser and Student A's shoulders was "incidental" contact as used in the special education field because Student A was not prevented by her from moving any part of his body. He was free to get up even while she had contact. She did not believe that the conduct was unwanted.

II. REMAINING ALLEGATIONS

A. *2006 Incident Involving Student BM*

Non-professional staff member L testified that in 2006, she saw Ms. Kiser forcefully grab the arm of Student BM, a special education student and forcefully pull the student down a hall. In essence, she testified that she was a new temporary paraprofessional in 2006 at Wayne Elementary School.⁸⁹ She was walking a group of students down a hallway when she saw Ms. Kiser talking to a student. She did not know what the conversation was, but she saw Ms. Kiser suddenly grab the student's bicep in a manner which she found to be shockingly forceful. She did not recall what the student was doing or how the student reacted. She did not know what the conversation was between the two before the incident. She did not know if he expressed pain. She did know that he pulled away.⁹⁰ Ms. Kiser did not attempt to regain physical contact with the student.

Ms. Kiser could not recall anything about this incident. She noted that student BM was not on her caseload and she never saw his IEP. The District used this incident as grounds for her dismissal, but primarily relied upon it as evidence of Ms. Kiser's habit of forcefully grabbing students and doing so by the arm. I conclude that the evidence of the incident is insufficient to be the grounds for discipline of any type in this matter. I have considered the evidence of habit as noted above. I note that grabbing by the bicep would be a safe way to avoid injury in situations in which grabbing were found to be appropriate.

The evidence is insufficient to support discipline for a number of reasons. First, the District did not discover in its investigation that Ms. Kiser was the administration's go-to person to deal with difficult disciplinary problems at Wayne Elementary School. Student BM was not on her caseload. If Ms. L's observation is viewed as complete, there was no reason for Ms. Kiser to be accosting this student because of the student's behavior at the moment.

⁸⁹ L. reported this to Ms. Horbas at the outset of the investigation into Student A's allegations. This was the first notice the District had of this incident.

⁹⁰ Tr. pp. 420-3, 425-6

Thus, it is more likely that she was acting at the behest of others. Without knowing who directed her to deal with Student BM at that moment, what that person told her to do, the level of authority of that person, and the reason why she was told to do it, it is not possible to conclude that her actions were misconduct. Further, the District did not investigate to determine if the incident was reported to administrators or known to administrators at the time.

Second, the District heavily relies upon Ms. L's shock for the conclusion that the grabbing was unnecessarily violent. Absent that observation, Ms. L's testimony fails to establish evidence of improper restraint. It is the only evidence which supports a conclusion that Ms. Kiser should have known the contact was unwanted at the outset. The student responded by pulling away. "Restraint" requires either "pain" or an act which restricts the free movement of a part of the student's body. There is no evidence that the student expressed pain. There is no evidence that Ms. Kiser re-attempted contact. If she did not attempt to re-establish contact, Ms. Kiser did not intend to restrict the movement of any part of the student's body. Therefore, no restraint occurred within the definition of the District's rules.

B. Incident with Student G

The District interviewed Student G in its investigation. Student G recounted an incident from the 2009-10, school year. Student G testified to this incident as follows. She and Ms. Kiser were in a hallway. She dropped her homework assignment in her previous class. Ms. Kiser told her she had to go back to the class and get it. She did not want to do that because she would be embarrassed by having to do so in front of others. Ms. Kiser took her by the arm⁹¹ and told her that she would get an "infraction" if she did not do so. Ms. Kiser pulled her by the arm for about fifteen feet while the two argued. As Student G reached the doorway, Student G put up her hand to prevent herself from being pulled through the doorway. Ms. Kiser let go and did not attempt to initiate any further physical contact. This was the only incident of physical contact she ever had with Ms. Kiser that caused her concern.

Ms. Kiser responded that she did recall the specific incident. Student G regularly forgot her materials and homework. She denied pulling Student G down the hallway. Ms. Kiser acknowledged that there may be occasions when she "guided" Student G down the hallway to get materials.⁹²

I conclude that the evidence is insufficient to show that Ms. Kiser was doing anything other than attempting to "guide" Student G and, at most, honest error in doing so. Student G had complied with "guiding" in the past. The use of incidental contact for this purpose was

⁹¹ I conclude the upper part of the bicep.

⁹² "Guided" in the customary manner Ms. Kiser described as noted above.

consistent with the IEP goals of Student G. At some point, this became unwanted contact for Student G. Because they moved only a short distance, the contact could only have been for a few moments. The evidence is insufficient to show that Ms. Kiser persisted in the contact after she became aware of the fact that the student did not want to be “guided.”

*C. Confrontation with Aide over Student R and violation of Student R’s IEP*⁹³

Student R transferred to this district from another district. The IEP in effect at the time she transferred was written in that other district. She was assigned to Ms. Kiser’s case load in the 2009-10, school year. Student R has Rhett syndrome. She was 12 at the time, but had a mental age of 2 years. She is a physically disabled student who, among other things, is unable to fulfill her basic needs. She is unable to signal when she needs to use the bathroom and needs assistance in toileting. She has slow reflexes, but is able to do some physical activities with a ball under very limited circumstances. Student R also has a compulsive disorder in which she constantly wrings her hands. She does this so constantly that this resulted in her hands being misshapen. She was assigned an aide, JA, to be with her at all times. JA was responsible to take direction from Student R’s parents and from R’s special education teacher. JA was not involved in educational planning and never saw Student R’s IEP.

JA testified as follows. Student R’s parents told her not to leave Student R alone when toileting because Student R has difficulty with her equilibrium, information she passed on to Ms. Kiser. JA ordinarily entered a special toilet stall with Student R and assisted Student R with each step of toileting. On one occasion, Ms. Kiser had taken Student R to the bathroom. Ms. Kiser was near Student R at all times, but not in the stall with her. Student R was in the stall facing toward the stall door but not undressing. JA entered the stall and started to assist Student R. Ms. Kiser stepped into the stall between JA and Student R. Ms. Kiser told her that Student R needed some privacy and independence. JA refused to leave because she felt it was her duty to the parents to not leave Student R alone. Ms. Kiser then repeated her statement. JA refused to leave. Ms. Kiser then pushed on JA’s shoulders which JA briefly resisted, but then left the stall. She reported the matter which ultimately was addressed by the building principal. He investigated the matter and discussed it with Ms. Burgard. The two discussed the matter and decided it was not a situation in which discipline was appropriate for either employee.

⁹³ There was also some discussion of Ms. Kiser using techniques such as holding hands with Student R or placing her hands on Student R’s hands to thwart her compulsive hand wringing. The compulsion is so bad that Student R’s hands are deformed. See, tr. pp. 688-9. This conduct is designed to prevent the student from injuring herself. This is not a violation of rule 447.1. Student R’s needs are so complex and require frequent physical contact. It is not a violation of her IEP to manager her compulsive hand wringing. This incident is not a significant factor in this case.

A second incident happened in the spring of 2011. JA gave Student R physical education separate from the physical education class for regular students. JA testified as follows. She regularly used a blow-up large gym ball well over 9 inches in diameter. Student R cannot catch, but if the ball bounces in front her she can trap it. In the spring, either before or after the new IEP was drafted in April, 2010, Ms. Kiser directed her to take Student R to regular physical education class and work separately with Student R on activities similar to those the entire class was working on. JA did not do it because she believed the parents had instructed her to keep Student R out of regular physical education. At one point, Ms. Kiser took Student R to the class which was then working on softball. Ms. Kiser tossed a regular softball to Student R in an attempt to have Student R catch it. She threw the ball in this manner about two times.

Ms. Kiser responded to one of the two incidents. She stated that as to the toileting issues, the three of them were in a handicap bathroom stall and that JA was improperly resisting her direction to leave and that it is likely she did push her. Ms. Kiser reported the matter to the principal because she believed that JA had failed to follow her directions. She did not respond to the incident concerning the ball. She stated that regularly used a number of interventions to have Student R stop wringing her hands. This included holding Student R's hands while they were walking. She did restrain Student R's hand on a number of occasions.

The District offers the foregoing as additional grounds for the discharge of Ms. Kiser and the "pushing incident" as evidence of the improper physicality of Ms. Kiser. I address the disciplinary grounds as to the first incident. The matter was investigated by the building principal and the results of the investigation were reviewed between him and Ms. Burgard. The two concluded at the time that it was a non-disciplinary matter. The evidence supports the conclusion that the first judgment was correct that the incident was not a matter over which Ms. Kiser was subject to discipline. The issue arose because of a difference between the duties of the two employees and because JA did not recognize her responsibility to follow the directions of Ms. Kiser. JA was responsible to follow the wishes and directions of the parents and to perform the tasks necessary to support Student R's functions. Ms. Kiser was responsible to implement the IEP's goals and to assess the student's changes in level of functioning. The judgment implicit in the decision made by the principal and Ms. Burgard is that Ms. Kiser was properly assessing Student R's degree of independence in toileting herself. A later IEP sets a goal for Student R to ". . . use the toilet at regular intervals and complete the necessary steps for toileting . . . with minimal adult assistance at least 4 times daily."

The physical interaction from Ms. Kiser to JA was a non-verbal assertion of authority. It was not intended to inflict pain or intimidate, but rather to communicate the urgency of not having a confrontation under those circumstances. This is not a violation of the above policy. It is not evidence of Ms. Kiser's habits with respect to her physical interactions with students.

The situation with respect to the softball was very serious. Student R is unable to protect herself. Ms. Burgard concluded that Ms. Kiser should be disciplined for violating Student R's IEP by using a regulation soft ball in the manner described by JA. Ms. Burgard testified that where Student R was able to catch a 8.5 inch diameter ball and the IEP goal was to improve this to an 8" ball, Ms. Kiser could not use a ball less than 8 inches in diameter.⁹⁴ I conclude that the District has failed to establish that Ms. Kiser violated the express terms of the IEP. The IEP was to improve Student R's ability to catch a ball of decreasing size. The IEP goal states the goals as follows:

[Student R] will be able to catch an 8" ball from a chest pass and bounce pass, at a distance of 7 feet, 77 out of 10 times.

The IEP is ambiguous because it does not state that the ball should be a diameter of 8 inches or a circumference of 8 inches. JA would not have been aware of what was stated in the IEP because she never saw the IEP. Ms. Kiser would not have consulted with JA about what size ball to use, but would have read the IEP. She would have selected the sports equipment with or without help of physical education personnel. The difficulty is not merely technical, but relates to the standards used to denominate sports equipment. The assumption in the District's position is that Ms. Kiser should have known that she was using the wrong sports equipment by correctly interpolating the IEP and correctly identifying the sports equipment. Because the situation was ambiguous, the only appropriate disciplinary action was a written warning.

D. Failure to Follow Student B's IEP as to a Safe Place

The District also grounded its decision to discharge Ms. Kiser on the basis that she failed to follow the IEP of Student B by failing to designate a "safe place" for him. Student B's IEP requires that "All staff members should know where [Student B's] "safety area", (sic) when he is too upset to stay in class. While this may be an infrequent event, it gives [Student B] the opportunity to regroup alone without shutting down. [Student B] should practice this procedure so that he can find his way to the specific area/room from any class in KMS." Student B's mother⁹⁵ was very concerned from the beginning of the year that Student B have an established safe place. An e-mail from Ms. Kiser to Student B's mother on September 8, 2010, essentially states that she had told Student B's teachers that if Student B becomes upset, he should be allowed to leave their classes. She further states that she has ". . . been so busy . . . that I have not had time to talk to [Student B] about this." It also states that he can always go to her room (which has a side office). The exact date of the start of school is not in the

⁹⁴ Tr. pp. 591-5

⁹⁵ I note that Student B's mother's testimony about the establishment of a safe place was substantially in error. It is not necessary to address this herein.

record, but is likely to be about seven school days earlier. Ms. Kiser did tell Student B that he could use the small office adjacent to her room as a “safety room.” Student B did go there.⁹⁶ Ms. Kiser never practiced with Student B going to his “safety area” from every room in the school. Ms. Kiser told all of Student B’s teachers that if he became upset he should be allowed to leave class. There is some evidence that Ms. Kiser did tell some teachers where Student B’s safety area was. Ms. Stangl testified that she had been told where Student B’s safety area was.⁹⁷ However, although she told Student B’s teachers that he should be allowed to leave their room, she did not tell all of his teachers where his safety room was.

The District is correct that Ms. Kiser did not fully establish a “safety area” for Student B until a few days into the school year. She did inform teachers from the beginning of the school year that he should be allowed to leave their classes, but never identified a specific “safety area” for him to most of them. The IEP states that: “All staff members should know here [Student B] goes, his ‘safety area,’ when he is too upset to stay in class. Notifying his teachers that he should be allowed to leave the room falls short of this in that they would not know where he was specifically to go. It also falls short of telling those who are not his teachers about his safe area and his right to go there. Student B was allowed to go to the “little room” in room 19 at will and knew where to go after September 9. Ms. Kiser never practiced going there with him.

The District’s failure to provide adequate resources was a major contributing factor to the “practicing going to the safe room” part of the “safe room” issue. Most of the teachers who worked with Ms. Kiser described her schedule as requiring her to be in too many places at one time and otherwise spread too thin. Ms. Kiser was replaced with another special education teacher on October 14. Sometime thereafter, the District provided an aide to assist that teacher. Student B’s mother testified that the successor teacher was not able to establish a safe place” for Student B until December.⁹⁸ The appropriate discipline for this situation is discussed below.

IV. APPROPRIATE REMEDY

As noted above, the District violated has failed to show just cause for disciplining Ms. Kiser for any of the incidents in dispute other than the three identified herein. It, therefore, violated the collective bargaining agreement for having imposed discipline for those

⁹⁶ See tr. pp. 257-8. I conclude that he was allowed to go there from any classroom he left.

⁹⁷ Tr. 771

⁹⁸ See, tr. p. 273. Ms. McKernan-Zunker testified that it was October or November. See, p. 393-4. However, Student B’s mother was directly concerned in that matter and it is likely that her testimony is more accurate.

circumstances. The next question is whether the District violated the just cause provision by discharging Ms. Kiser for the three incidents. Under the just cause doctrine, arbitrators have the authority to review the penalty imposed primarily to determine if the penalty is proportionate to the offense the employee actually committed.⁹⁹

As noted above, the proven situation with selecting the wrong sports equipment merits only a written warning. The situation with Student B's safe place does not merit discharge. As noted above, the District contributed to Ms. Kiser's inability to practice with Student A going to his safe place, by not allowing her sufficient time in her schedule to work alone with him between classes. Ms. Kiser did notify Student A's teachers to allow Student A to leave their classes if he became upset and chose to do so. She did not complete the process by telling them specifically where his "safe place" was. The IEP has some ambiguity as to specifically how far she should have gone in notifying other District personnel. Neither of these factors would merit discharge.

I turn to the conduct with Student A in the sustained incident involving allegations of improper contact. Ms. Horbas testified that essentially discharge was the appropriate discipline for Ms. Kiser because she was regularly intentionally using pain and physical restraint to create an atmosphere of fear in her students. She noted that learning takes place in a positive, not a negative environment.¹⁰⁰ The facts do not support the conclusion that Ms. Kiser intentionally used pain as an inducement to follow her directions at all. Any pain which was caused occurred as a matter of necessity for the safety of students on October 12, inadvertently while trying to use incidental contact to redirect students, or in the few instances of momentary restraint involving Student A when he reasserted himself. Ms. Horbas testified that she would not have recommended discharge were the situation one of isolated error. I conclude that the circumstances involve error of that type and, therefore, the District would not have terminated Ms. Kiser had it reached the proper factual conclusions.¹⁰¹

The District has a legitimate disciplinary interest in insuring the safety of its special education students from restraint and all of its students from situations which put them in fear for their safety. The District also has a legitimate interest in protecting parents' interests under the IDEA and its interest in being informed even of honest mistakes in physical contact.

The factors which District witnesses indicated affected their judgment can be assessed to determine what penalty the District properly would or should have imposed upon Ms. Kiser.

⁹⁹ *Common Law*, Sec. 6.7

¹⁰⁰ Tr. p. 554-556

¹⁰¹ See, tr. p. 552 lines 9-10.

One of the major factors underlying the District's decision was the District's consideration that Ms. Kiser created a negative, rather than a positive learning environment. I conclude that Ms. Kiser was acting in the District's interests and the student's interest as expressed in his IEP by establishing the "negative" environment of the SSR. This is true even though the chosen intervention failed with serious consequences. The evidence indicates that the "negative" environment in SSR occurred primarily because Ms. Kiser was being verbally stern with Student A about his avoidance behavior. His prior special education teacher notified Ms. Kiser that she was having substantial difficulty with Student A doing anything. Student A's avoidance behavior became so disruptive to regular education students that his regular SSR teacher requested at the end of the first two weeks of school that he be removed from regular education SSR. Student A was also maturing very rapidly between 5th and 6th grade. As noted above Student A's IEP required that he "self-start" and "remain" on task for up to 10 minutes. In this context, it was in the interest of the student to try to create an environment in which he developed recognition that his own behavior was avoidant and to choose to remain on task.

Ms. Kiser also chose to use incidental contacts as "prompts" for Student A. The IEP recognizes that frequent "prompts" are necessary for Student A. Incidental physical prompts fall within the ordinary meaning of that term. Ms. King, Student A's special education teacher from the year before, generally is reluctant to use incidental contact. However, she did use incidental contact with Student A to redirect him.¹⁰² While regular physical interaction may be a last resort, in the case of this student, the use of incidental contact on a regular basis was clearly in his interest as long as he was accepting the contact. Ms. Kiser never knew that Student A was focusing resentment on her physical contacts. The District's concern about Ms. Kiser reporting incidental contact on its prescribed form is without merit. The evidence indicates that special education teachers never report incidental contact on the District's forms and there is no reason why Ms. Kiser should have known that she should do so. In this regard, she was entitled to at least some advance knowledge that that would have been required in this circumstance before being terminated for failing to do so.

The District's next concern is that if Ms. Kiser believed that restraint was necessary, she should have immediately initiated the process of changing Student A's IEP. The practicing special education teachers tended to disagree with the District's rigorous position. They recognized that not everything which a student needs is clearly expressed in IEP's. Ms. Kiser did attempt to maintain contact with Student A's mother. On September 30, she sent an e mail to Student A's mother and suggested making a change in his IEP to create more study time for him. She asked to meet with Student A's mother. She also noted that Student A was becoming even more highly distracted and questioned whether his medication had stopped being effective.¹⁰³ In this regard, the evidence indicates that Ms. Kiser was trying to fix the

¹⁰² Tr. p. 744

¹⁰³ This echoed prior discussion between Ms. King and Student A's mother on the same subject.

cause of Student A's problem rather than making a permanent change in his IEP. However, what is missing most is any documentation in Ms. Kiser's files, the e-mails to her mother or to the District of these specific incidents. In this regard, Ms. Kiser clearly fell short of the District's rightful expectations of some form of documentation either with the mother or with the District.

There are other obvious issues with Ms. Kiser's choices as they relate to Student A. The fact that "incidental" contact may be allowed, does not necessarily make it a wise choice. First, as is noted above, frequent physical contact of any kind in special education carries with it risks that the contact could be misunderstood. When frequent contact is coupled with a "stern" atmosphere, this risk is greatly magnified. Second, when benign shoulder touching is interspersed with more forceful contact to the shoulders there is a substantial risk that the student would be fearful every time he is touched. Third, this was a situation in which planning incidental contact with parents, administrators and Student A himself would have gone a long way. Fourth, it is apparent now that some form of documentation of what occurs is vital to help in all respects.

Ms. Horbas' testimony indicates that Ms. Kiser would not have been discharged had there been room to "work with her." The record does not sustain the view that Ms. Kiser is unwilling or unable to learn from this difficult situation. The District has called upon her to use physical contact in her service at the elementary school and, therefore, it is not believable that the District does not believe that it could not work with her.

Arbitrators and employers also consider length of service as a factor in determining appropriate discipline. In this circumstance, Ms. Kiser has a long record of service and no issues with respect to her physical contact with students prior to this incident. She has, however, been subject to prior progressive discipline for failure to follow students' IEP's properly. Her last discipline was a suspension on June 2, 2010, for negligently allowing a student's IEP to expire and failing to follow proper procedures in renewing it. Under the circumstances, I conclude that the District did not have just cause to terminate Ms. Kiser, but did have just cause to discipline her. Accordingly, I order that Ms. Kiser be reinstated and be made whole for all lost wages and benefits, less that which would represent a thirty (30) day suspension.

AWARD

The District did not have just cause to discharge Ms. Kiser. It shall reinstate her to her former or substantially equivalent position and make her whole for all lost wages and benefits, except that which would constitute a thirty (30) day suspension

Dated at Madison, Wisconsin, this 3rd day of May, 2012.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator