BEFORE THE FAIR DISMISSAL APPEALS BOARD OF THE STATE OF OREGON

In The Matter of the Appeal of JACQUELYN HALLQUIST Appellant, *v.* HILLSBORO SCHOOL DISTRICT, Respondent.	**Case No.:** FDA-23-02 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

INTRODUCTION

Appellant, a contract teacher, was dismissed from her employment with the Hillsboro School District ("District") on October 24, 2023. She timely appealed to the Fair Dismissal Appeals Board ("FDAB") on November 7, 2023. Both Appellant and the District waived the requirement that a contested case hearing be held by an FDAB panel within 100 days of the receipt by the teacher of the notice of dismissal. *See* ORS 342.905(5)(a). A hearing on the merits was conducted in Hillsboro, Oregon on April 9 and 10, 2024. Appellant was represented by Katelyn S. Oldham, Attorney at Law, Oldham Law Office, and the District was represented by Michael Porter, Attorney at Law, Miller Nash LLP. The hearing was conducted before a panel appointed from the FDAB, consisting of Robert Sconce, James Westrick, and Ron Gallinat. The panel, having considered the evidence and the arguments of counsel, makes the following rulings, findings, conclusions of law, and order.

PANEL RULINGS

At hearing, the District objected to admission of Appellant's Exhibit A-7. Exhibit A-7 is an email from the Department of Human Services Office of Training, Investigations and Safety (OTIS) notifying the District that a report to OTIS about the incident on April 19, 2023 was being closed at screening because (a) the reported concerns did not rise to the level of an

allegation of physical abuse as defined in ORS 419B.005(1)(a)(A) and (b) OTIS does not have jurisdiction to investigate wrongful restraints in school settings.

ORS 342.905(5)(a) provides that "[a]t least 10 days prior to the hearing, the teacher shall provide a list of witnesses and exhibits to the Fair Dismissal Appeals Board panel and the school district." *See also* OAR 586-030-0050(4) (requiring the parties to exchange exhibits for their respective case-in-chief 10 calendar days before the hearing). OAR 586-030-0050(6) provides that exhibits not premarked and distributed prior to the hearing will be excluded in that party's case-in-chief unless good cause is shown. Here, Exhibit A-7 was not included on Appellant's exhibit list. Appellant argued that Exhibit A-7 was necessary as a "supplement" to the District's incomplete investigatory file. Hearing Transcript ("Tr") 222:20-25. Appellant also argued that the exhibit was necessary to rebut what Appellant described as the District's "inflammatory" testimony about the allegedly abusive nature of the interaction with Student E on April 19, 2023. Tr. 224:3.

Appellant's argument that the exhibit was necessary to supplement the investigatory materials does not constitute good cause. To the extent Appellant anticipated arguing that the investigation was incomplete, Appellant should have identified the "missing" documents from the investigatory file and included them on her exhibit list. In addition, considering that the superintendent's recommendation for dismissal described Appellant as using "inappropriate and forceful contact in a physical struggle with the student," Exhibit D-1 at 5, Appellant could have anticipated the District's evidence and should have included the exhibit in her exhibit list. The panel therefore finds that there is no good cause for omission of Exhibit A-7 from Appellant's exhibit list and exchange of exhibits and sustains the objection.

FINDINGS OF FACT

Appellant's Employment and Background Facts

1. Appellant was a teacher at Imlay Elementary School in the Hillsboro School District beginning August 1, 2018. During the 2022-2023 school year, she was a case manager for third and fourth-grade students in a non-categorical classroom. Tr. 318:11-23; Exh. A-1 at 50. Appellant served a wide range of students with special needs, including students on the autism spectrum. In 2022-2023, Appellant had ten students highly impacted by autism in her room, and a total of 35 students on her caseload. Tr. 406:4-7; Tr. 406:14-17. Appellant was well-regarded by the third/fourth grade team of teachers at Imlay, who viewed her as skilled at connecting with and instructing special education students, particularly in the area of reading. Tr. 235:16-236:11; 242:22-243:11; 253:11-255:12. Appellant received the District's annual Safety Care training on restraint and seclusion (described below) on three occasions before the April 19, 2023 event at issue in this case. Exh. A-1 at 8, 11-12.

2. Before joining the faculty at Imlay Elementary School in 2018, Appellant previously worked for Multnomah Education Service District (from 2014 to 2018), for Reynolds High School (from 2013 to 2014), and for Washington Elementary school in Woodburn (from 2012 to 2013). Before that, Appellant's professional experience included service as a para educator, a computer technology teacher, and a reading specialist. She was originally hired by the Hillsboro School District in 2007.

3. Until the events at issue in this case, Appellant had never received any discipline or indication of poor performance from the District.

4. Mykal Rojas was the Principal of Imlay Elementary School during the 2022-2023 school year. It was his first year as a principal and his first year at Imlay. Tr. 312:8; 331:1-4. Previously, Principal Rojas had served as assistant principal and interim principal at the elementary level for three years, and before that he was a first-grade teacher. Tr. 313:13-16. Principal Rojas had received the District's Safety Care training. Tr. 314:11-12.

5. Amber Owens was the office manager at Imlay. The 2022-2023 school year was her first year as office manager. Owens had received Safety Care training. Tr. 36:1-2.

6. Brian Haats was the Human Resources Director for licensed employees. Haats has held that role for approximately eight years. Previously, Haats was a principal from 2011 to 2016. Haats had not received Safety Care training. Tr. 186:21-187:2.

The History of Student E

7. Student E was in the third grade during the 2022-2023 school year and was a student in the third-grade general education class taught by Tammy Biddington. Tr. 227:13-17. However, Student E was not able to attend Ms. Biddington's class regularly. Tr. 347:21-348:13; 228:3-13. Rather, Student E, who was on Appellant's caseload, spent most of her time in Appellant's room. Appellant was on medical leave from October 7, 2022 until approximately April 1, 2023, and during her absence, another special education teacher served as case manager for Student E. Tr. 404:8-14.

8. Student E is highly impacted by autism. She is largely non-verbal, although she can communicate in words (but not full sentences) when calm. Tr. 416:6-15. Appellant was very familiar with Student E and had taught her in both kindergarten and in first grade. Tr. 414:20-415:19. However, Appellant's leave of absence (from October 2022 through April 2023) meant

that Appellant had returned to work only a few weeks before the April 19 event and had not spent the entire 2022-2023 school year teaching Student E.

9. Student E had a history well-known to Imlay staff of running out of the school building, causing worry for Imlay staff that she would run before cars or a school bus or into the roads surrounding the school. Principal Rojas frequently followed Student E out of the school building and returned her to the school building. Tr. 316:7-11; 230:14-18. Principal Rojas acknowledged that at times he had grabbed Student E's hand to return her to the school, but he believed he did so in a way consistent with the District's Safety Care training. Tr. 369:16-370:2; 370:9-13.

10. Before the April 19, 2023 event at issue in this case, Student E also had become dysregulated and showed escalated behavior in the school hallways on multiple occasions. During those occasions, she would fall to the floor, throw herself against the wall, and scream in the hallway. Tr. 317:20-24.

11. Student E had a Behavioral Support Plan (BSP) dated January 6, 2023. Exh. D-7. The BSP provides that Student E "will run to a safe spot in the school" as a replacement behavior for dysregulated or escalated behavior. Student E's "safe spot" is identified in the BSP as the conference room or Room 207. The BSP indicates that, as a supportive guide, Student E is to have "one person and 2 people." Exh. D-7 at 2. According to the BSP, this "is to prevent [Student E] from running out into the street." *Id.*

12. Student E also had a Response Plan dated January 6, 2023. The Response Plan prescribes the actions Imlay staff should take when Student E engages in behavior ranging from level 1 (behaviors at baseline, when Student E is calm and complies with direction) to level 5

(when Student E is falling to the floor, slamming her head against the floor, and screaming). Exh. D-8.

13. For level 4 behaviors (behaviors that do not allow staff to engage safely with student, including screaming and crying), the Response Plan requires the following actions:

> "Create space between [Student E] and other students
> Switch out Adults
> --no vocal directions or talking
> --if in the classroom you can sit on a chair and have another chair next to you. You can hum and point to the chair for her to join you.
> --Call for 2:1 support if not already in place
> --Should this behavior occur for 10 minutes without de-escalation, offer coloring using half sheets of paper.
> [Student E] needs to be calm and able to follow directions in the classroom for 3 to 5 minutes." Exh. D-8 at 1.

14. For level 5 behaviors (falling to the floor, slamming her head against the floor, screaming), the Response Plan requires the following actions:

> "Room clear
> Place a jacket or pillow under her head
> Use a visual for swing, going for a walk or drawing
> Play music
> 2:1 adult support
> --no vocal directions or talking." Exh. D-8 at 1.

15. In April 2023, Appellant and other Imlay staff who worked with Student E had a protocol for the end of the school day. At dismissal time, to safely transition Student E from the school day to her transportation home, a staff member would walk Student E from Appellant's room to the conference room across from the school office. Student E was then required to be calm for 20 minutes in the conference room before being transitioned to her transportation home. Tr. 309:17-25; 341:20-23.

The District's Policies on Restraint and Seclusion; the District's Safety Care Training

16. District Policy GCAA, Standards for Competent and Ethical Performance of Oregon Educators, in effect since November 15, 2022, provides in relevant part that the competent teacher "demonstrates a commitment" to "[r]ecognize the worth and dignity of all persons and respect for each individual" and "[u]se professional judgment." Exh. D-5 at 3. The policy also provides that the "competent teacher demonstrates skills" in "[a]biding by lawful and reasonable District rules and regulations." Exh. D-5 at 4.

17. District Policy GABA, Standards of Ethical Professional Performance, in effect since April 28, 2020, provides that the District's employees are expected to "[d]eal justly and considerately with each student." Exh. D-4 at 1.

18. District Policy JGAB, Use of Restraint and Seclusion, in effect since December 6, 2022, provides in relevant part:

> "Restraint may be imposed on a student in the district only under the following circumstances:
> 1. The student's behavior imposes a reasonable risk of imminent and substantial physical or bodily injury to the student or others; and
> 2. Less restrictive interventions would not be effective." Exh. D-2.

The policy also provides:

> "If restraint or seclusion is used on a student, by trained staff or other staff available in the case of an emergency when trained staff are not immediately available due to the unforeseeable nature of the emergency, e.g., teacher, administrator, it will be used only for as long as the student's behavior poses a reasonable risk of imminent and substantial physical or bodily injury to the student or others and less restrictive interventions would not be effective. Students will be continuously monitored by staff for the duration of the restraint or seclusion."

19. The District has a training program that prescribes the circumstances in which students may be physically restrained or secluded. Until approximately 2019, the District used the Oregon Intervention System (OIS), which is typically used in residential programs. Tr. 65:4-

66:18. In about 2019, the District discontinued OIS and moved to a new training program called Safety Care. *Id.* Safety Care is approved by the Oregon Department of Education for use in public schools. Tr. 68:19-69:8.

20. Linda Chan is a District employee who trains District staff on Safety Care. She received one week of training—four days of curriculum and one day of practicing interventions. Following that training she received certification in Safety Care. Tr. 68:8-14.

21. The District requires some, but not all, employees to be certified in Safety Care. School principals, special education staff, counselors, and speech language pathologists are required to be trained in Safety Care. Tr. 69:9-70:3. Employees who complete Safety Care training receive a one-year "certification" in Safety Care. To obtain recertification, employees take an eight-question test. The test consists primarily of true/false, multiple choice, and "fill-in-the-blank" questions. Exh. A-1 at 9-10.

22. Employees who are required to obtain Safety Care training sign a document entitled "Safety-Care Specialist Training Agreement." Tr. 71:20-72:3. Appellant signed a Safety-Care Specialist Training Agreement on April 26, 2022. Exh. A-1 at 8. Appellant previously received one-year Safety Care certifications and signed the Safety-Care Specialist Training Agreement on December 5, 2019 and on March 18, 2021. Exh. A-1 at 11-12.

23. The "Safety-Care Specialist Training Agreement" provides, in relevant part:

> "Your initial certification will last for one year from the first day of your initial training. After that, your continued certification will depend on re-certification, which is the process by which a certified Safey-Care Trainer determines that you have maintained your ability to act as a Safety-Care Specialist safely and effectively. To maintain your certification, you must participate in and pass re-certification within 365 days of your initial training or last re-certification. If you fail to do so, your certification will lapse and your status as a Specialist will be revoked. *If you participate in and pass a re-certification session within 3 months of lapsing, your status as a Specialist will be restored.* If more than 3 months pass following a lapse in certification, then, in order to again become certified as a

> Specialist, you will need to participate in a full Safety-Care training session and again meet all the requirements for certification." Exh. A-1 at 8, paragraph 4 (emphasis added).

24. If an employee's certification expires and the employee is no longer covered by a certification, the District, through Chan, attempts to find a timely training opportunity so that the employee can be recertified.

25. Safety Care training teaches a number of techniques, including a technique called "elbow check." When using an elbow check, the staff member stands, sits, or kneels to the side, facing in the same direction as the student. If the student is comfortable with physical contact, the staff member can place their hand gently against the student's arm. Exh. D-3 at p. 20. The Safety Care training also includes two variations—the "forearm check," in which the staff member places a "closed hand over the forearm just below the elbow (touching or shadowing) to limit hitting[,]" and the "knee check," in which the staff member places a "closed hand over the leg just above the knee (touching or shadowing) to limiting kicking or kneeing." Exh. D-3 at 20.

26. The Safety Care training teaches staff that the "elbow check" and its two variations require the use of a closed hand. The Safety Care training defines a "closed hand" as a hand "in which the fingers and thumb are held together and the hand is slightly cupped, as if to hold water or when performing a 'queen's wave.'" Exh. D-3 at 20. The Safety Care training teaches that "[u]sing a closed hand is less intrusive than other options and will decrease the chance of injury, pain, or agitation." Exh. D-3 at 20.

27. The Safety Care training also teaches de-escalation strategies that help the agitated student to exhibit calmer, safer behavior. Exh. D-3 at 30-31. Chan testified that District staff were required to pass this component of the training to be certified.

28. The Safety Care training teaches that "physical management" may be used "only when necessary for safety, and only with the utmost care for the safety and well-being of the agitated person and everyone else." Exh. D-3 at 58. The training teaches that "[i]n deciding whether to use physical management in a crisis situation, it's important to understand the risks involved." Exh. D-3 at 58. Those risks are both physical and psychological. *Id.* The Safety Care training teaches that physical risks are cuts or scrapes; bruises, sprains, muscle soreness; hyperthermia (overheating); broken bones or teeth; seizure; head trauma, organ damage, internal bleeding; cardiac arrest; and asphyxia or hypoxia. *Id.* The Safety Care training teaches that psychological risks are psychological trauma if the person has experienced abuse or other trauma in the past, and reinforcement of dangerous behaviors, "potentially leading to more of those behaviors and more need for physical management."

29. The District omits some of the physical management techniques from its general training. Tr. 84:2-8. Chan testified that certain physical management techniques are taught only on an individual basis. *Id.* The District trains District staff that they may use only two physical restraints: (1) supportive guide, and (2) one-person stability hold. Tr. 125:12-20.

30. The Safety Care training also teaches that the authorized physical management techniques may be used only "when there is no other safe alternative" and when all of the following three conditions are met: (1) there is an imminent risk of serious harm to the agitated person or someone else; (2) there is no other practical way to prevent that harm without physical management; ***and*** (3) the risk of not intervening must be greater than the risk of intervening. Exh. D-3 at 135.

31. The Safety Care training teaches that the "following practices should not be used:"

"Don't use physical management for convenience, coercion, punishment, to show the person that you are in charge, or because de-escalation is taking 'too long.'

"Don't apply any pressure to the head, neck, or torso.

"Don't restrict breathing, block the airway, place an object over the face, put pressure on the diaphragm, or allow the person's arm across the neck or diaphragm.

"Don't assume that struggling, talking, or yelling means that the person is able to breathe.

"Don't use joint locks or pressure points.

"Don't twist or hyper-extend joints.

"Don't place the person into an uncomfortable or awkward physical posture.

"Don't use physical management to inflict pain.

"Don't use incorrect, unauthorized, or modified physical management procedures.

"Don't use more force than necessary for safety and stability.

"Don't push the person against a wall or over an object such as a chair or table.

"Don't straddle the person's torso, neck, or head.

"Don't require the person to sit or lie down on rough or unsafe surfaces.

"Don't attempt to transport the person on unsteady footing such as stairs, debris, or ice.

"Don't continue using physical management longer than necessary for safety." Exh. D-3 at 135.

The April 19 Interaction With Student E

32. During the 2022-2023 school year, classes at Imlay concluded at 2:05 p.m. on Wednesdays. Tr. 47:21-25; Exh. D-17.

33. At 2:08 p.m. on April 19, 2023, consistent with the end-of-day routine for Student E, Student E was waiting in the conference room across from the school office before leaving school for the day. Special education assistant YA, a fairly new education assistant to Student E, was with Student E.[1] Tr. 389:17-21. The conference room door was closed.[2] Exh. D-9. Appellant

[1] This opinion and order uses the pseudonyms YA and AK for the special education assistants involved in the interaction with Student E.

[2] The District offered video camera footage from Imlay Elementary School on April 19, 2023 as Exhibit D-9. Findings of Fact 33 through 52 are based on the video camera footage, as narrated and explained by the witnesses at hearing.

was not in the area; she was at the school's back door overseeing the departure of students from the school. Tr. 392:11-13. Multiple groups of students were in the hallway between the office and the conference room walking toward the school's main exits. The hallway floor in the area is a smooth polished surface.

34. At 2:09 p.m., while there were still students in the hallway, Student E and YA emerged from the conference room into the hallway. Immediately after entering the hallway, Student E began to resist YA, who was holding on to Student E by her forearm. Within a few seconds, Student E, who was dysregulated, dropped to the floor in a seated position a few feet outside the conference room. A few seconds later, Student E stood up and briefly attempted to run away from YA. Student E then stepped closer to the school office door and dropped to the floor again. While lying on the hallway floor, Student E kicked her feet several times on the floor and gestured with her hands in front of her forehead, touching her forehead on several occasions. YA stood over Student E and showed her a small stuffed bunny, a familiar toy to Student E, in an attempt to calm her, while gesturing with her free hand that Student E should stand up.

35. From 2:09:37 p.m. to 2:10:01 p.m., Student E remained lying on the hallway floor, generally still, and at times reaching with her right hand toward YA, who still had the stuffed bunny in her hand. During this time, a teacher who was passing by stopped a few feet from Student E and directed the departing students, who were still in the hallway, to walk around Student E.

36. At 2:10:01 p.m., Student E stood up for four to five seconds and looked into the school office through the interior window. YA stood next to her without touching her. Student E then threw herself down on the hallway floor again and moved her legs back and forth in a kicking motion.

37. At 2:10:09 p.m., Appellant joined YA and Student E outside the school office. Student E was still lying on the hallway floor moving her legs in a kicking motion. At this point, the groups of students in the hallway had all left the hallway and the hallway was empty, except for Appellant, YA, and Student E. Appellant called special education assistant AK to join them to assist in working with Student E.

38. From 2:10:09 p.m. to 2:10:30 p.m., Appellant and YA conferred in the hallway while Student E remained lying on the hallway floor, kicking her legs in a kicking motion. At 2:10:23 p.m., Student E reached with her hand up to YA as if trying to grasp the stuffed bunny.

39. At 2:10:29 p.m., Student E got up from the floor. Appellant and YA attempted to surround her, but Student E broke free from them and ran down the empty hallway away from the school office and conference room, leaving her sweatshirt on the hallway floor in front of the school office. Both Appellant and YA ran after Student E down the hallway.

40. Approximately 11 seconds later, Appellant and YA were able to stop Student E from running further. During this period, several adults were in the hallway. One stopped to talk with Appellant and YA. At 2:10:58 p.m., five adults walked toward the school office toward the school's front doors. Several turned to look at Student E toward the end of the hallway. Two adults walked down the hallway and past Appellant, YA, and Student E.

41. While Student E and the adults were at the end of the hallway, at approximately 2:11:32 p.m., special education assistant AK joined Appellant and YA in the hallway. AK often worked with Student E. Appellant testified that if anyone could calm Student E down, it was AK. AK gave Student E the stuffed bunny toy and persuaded her to stand up. During this time, two other adults were in the hallway, at approximately 2:11:55 p.m.

42. At approximately 2:12:06 p.m., Student E got up from the hallway floor and appeared ready to break into another run. Appellant, YA, and AK surrounded her to stop her from running. Student E then dropped down on the hallway floor again, kicking her feet against the hallway floor and occasionally using her hands to gesture toward and touch her forehead. She remained lying on the hallway floor for approximately one minute, while Appellant, YA, and AK stood over her, not touching her. At 2:12:46, an adult walked by Appellant, YA, AK, and Student E. At this point, Student E was lying generally still on the floor, but gesturing around her head with her hands.

43. At 2:13:15 p.m., Student E stood up, and AK, accompanied by Appellant and YA, began walking with Student E back up the hallway toward the school office and the conference room across from the office. Approximately seven seconds later, Student E began to run. Appellant and AK remained on either side of Student E while she was attempting to begin running. AK held her hand around Student E's left wrist. Appellant walked close to Student E on her right side, but did not have her hand on Student E's wrist or arm. YA separated from the group to retrieve Student E's jacket, which had been left in front of the school office on the hallway floor.

44. Once the group was back in front of the conference room, at 2:13:27 p.m., AK, with her hand around Student E's wrist, attempted to guide Student E into the conference room, but Student E resisted. From 2:13:34 to 2:13:37 p.m., AK, with her hand around Student E's wrist, attempted to guide Student E through the conference room door while Appellant stood close to Student E, using her body to guide Student E toward the door. At 2:13:38, once AK was through the conference room doorway, Student E dropped to the hallway floor again in front of the conference room, with her feet a few feet away from the conference room door. YA quickly

moved toward Student E's head and put her hands under Student E's head. Appellant kneeled on the hallway floor at Student E's feet and YA kneeled on the floor by Student E's head. Student E kicked her feet against the hallway floor several times and gestured with her hands toward her head, slapping her forehead.

45. At 2:13:51 p.m., Appellant, still kneeling, turned away from YA, AK, and Student E and looked down the hallway and away from their group. Appellant believed there were teachers at the end of the hallway and Appellant wanted to signal to them that they should not stand and watch while Student E was dysregulated and engaged in escalated behavior. Appellant testified that she cares about students on the autism spectrum, and it was important to her that such students were not the subject of staring or similar behavior by others. From 2:13:51 p.m. until 2:13:54 p.m., Student E stopped moving her legs and hands.

46. At 2:13:54 p.m., Appellant turned back to Student E. Appellant then placed her hand on Student E's calf and slid Student E a foot or so down the hallway floor. Appellant then placed her other hand on Student E's other calf. YA and AK walked next to Student E, who was still lying on the floor. At 2:13:58 p.m., Student E grabbed the stuffed bunny, which was lying on the floor beside her. Appellant slid Student E a short distance (a foot to several feet) to the threshold to the conference room. Student E was still during this time.

47. At 2:14:05 p.m., YA dropped to her knees so that she was behind Student E. AK was standing near Student E's head and holding Student E's backpack. Once Student E's feet and lower legs were through the conference room door at approximately 2:14:09 p.m., Appellant and YA lifted Student E into a sitting position and moved her through the doorway into the conference room while AK stood behind them. The two special education assistants followed Student E into the conference room and closed the door. Appellant remained in the hallway.

48. Throughout the interaction, Student E was intermittingly using a raised voice that some witnesses described as screaming and one witness described as "melodic but unhappy" screaming. Tr. 237:2. According to multiple witnesses, Student E frequently screamed, threw herself on the floor, and threw herself against the walls when she was in the hallway. Tr. 228:21-229:13; 239:18-240:12; 256:10-25.

49. Student E was not injured during her movement by Appellant and the two special education assistants into the conference room. Tr. 206:23-207:2.

50. Approximately 20 seconds later, teacher Tammy Biddington approached Appellant in the hallway. Appellant and Biddington briefly spoke about whether Student E was going to be able to get to the school bus and how to help Student E. Tr. 237:22-238:1.

51. At 2:15:28 p.m., Owens walked up the hallway into the area between the school office and the conference room. Owens and Biddington had a brief conversation generally about how to help Student E. Tr. 238:2-14; Tr. 49:7-11.

52. Owens and Appellant also briefly talked in the hallway. Owens and Appellant briefly discussed whether Student E was going to make it onto the bus. Owens also asked if Student E was in seclusion and Appellant responded that she was. Tr. 45:1-13; 49:20-50:6.

53. After a short time in the conference room, Student E, who by then had become calm, was taken home by her parent.

54. After the incident on April 19, Appellant completed the District's "Use of Restraint/Seclusion Incident Report." Exh. D-11. Appellant was in a hurry, and in the section labeled "PPI used," Appellant checked "Supportive Guide" and "Person Stability Hold," but did not include a narrative. She also omitted YA's name from the list of staff involved. The incident report form includes a section the "time began" and "time ended" for both a restraint and

seclusion. Appellant left the "restraint" section blank and reported that the "seclusion" began at 2:00 p.m. and ended at 2:15 p.m.

55. The next day, realizing that she had been rushed in typing the answers into the form, Appellant wanted to amend the incident report. However, when she realized that the report could not be amended, Appellant prepared a second "Use of Restraint/Seclusion Incident Report." Exh. D-12. In this second report, Appellant expanded her entry in the section labeled "PPI used" to state that Student E "was leaning back on staff members knees as we were trying to get through the entry doors. After multiple attempts to prompt her to go into the room, three staff slid her about a foot to get her safely in the room." Appellant also added YA's name to the list of staff involved. Like the first report, Appellant left the "restraint" section blank and reported that the "seclusion" began at 2:00 p.m. and ended at 2:15 p.m.

56. Following the April 19 event, Appellant initiated a meeting with Amy DeCoster, the Support Specialist/Autism Consultant for Imlay, to discuss methods for better approaching future interactions with Student E. Tr. 423:21-25.

Events After the April 19 Interaction With Student E

57. Because Principal Rojas was out of the office on April 19, Owens decided that she should watch the video footage. She did so and concluded that the interaction of Appellant and the two special education assistants with Student E should be reported to Principal Rojas. Owens emailed Principal Rojas and told him about the event and advised him to watch the video.[3] Owens was not familiar with Student E's Behavioral Support Plan. Tr. 54:6-8.

58. When he returned to the school, Principal Rojas reviewed the video footage. Principal Rojas directed Owens to prepare a witness statement, which she did on April 20, 2023.

[3] Owens's email is not in the record.

Tr. 50:20-51:3; Exh. D-16. Owens acknowledged in her statement that she could not see all the events in the video because of the angle of the camera and could not hear what was said. Owens wrote, "I will say that in my opinion, there were many instances of dangerous physical restraint, carrying, dragging and unnecessary force. This all happened very quickly, and the order of events may vary some." Exh. D-16 at 1.

59. Principal Rojas also consulted with his supervisor, Lindsay Garcia. They contacted the District's Human Resource Officer Kona Lew-Williams. Lew-Williams supervises Brian Haats, Human Resources Director for Licensed Staff. Lew-Williams was covering for Haats at the time because he was out of the office. Principal Rojas, Garcia, and Lew-Williams collectively decided to place Appellant on paid administrative leave, effective April 20, 2023.

60. In a memorandum to Appellant dated April 20, 2023, Lew-Williams notified Appellant that she was being placed on paid administrative leave, effective April 20, 2023 and that "Brian Haats will be contacting you to schedule a due process meeting for the purpose of informing you of the next steps." Exhs. D-15; A-1 at 7.

61. Haats returned to the office on April 21. Haats oversaw the District's investigation of Appellant's interaction with Student E. Haats relied on Principal Rojas to gather some information. Principal Rojas sent an email to Linda Chan with questions, and Rojas provided Chan's written answers to Haats. Exh. D-24. Principal Rojas also asked Tammy Biddington to write a statement.[4] Tr. 240:25-241:5.

62. On April 28, 2023, the District held what it called a "due process meeting" with Appellant.[5] Haats and Principal Rojas attended on behalf of the District. Appellant was accompanied by Mu Son Chi, her representative from the Oregon Education Association.

[4] Biddington's written statement is not in the record. Biddington testified that she was not interviewed. Tr. 249:8-20.
[5] The "due process meeting" appears to have been akin to an investigatory interview of Appellant.

63. During the meeting, Appellant was asked generally to share what she "felt happened that day." Exh. D-17. Appellant explained that she encountered Student E with one of the special education assistants. Based on Student E's behavior, Appellant thought that Student E might try to run down the road as she had on "numerous occasions." Exh. D-17 at 2. Appellant called for help from a second special education assistant, AK. Appellant stated that "if anybody can get the student clam down when she's escalated like that," it was AK. Exh. D-17 at 2. Appellant explained that, at that point, Student E was "so escalated" that AK's presence did not have a calming effect.

64. Appellant explained that beginning earlier that school year, she and the special education assistants started a routine in which Student E would be walked to the conference room about 15 minutes before dismissal. In the conference room, Student E could do something fun, such as making a bead bracelet. Exh. D-17 at 3. However, on this particular day, according to Appellant, Student E "wasn't calm[,]" and had nonetheless been moved to the hallway while not in a calm state. Exh. D-17 at 3.

65. Appellant explained that, ultimately, Student E was lying "not very far" from the conference room door. Exh. D-17 at 4. Appellant explained to Principal Rojas and Haats that, at that point, she "thought, okay, we'll just slide her, I mean, her feet were by the door, so I thought, slide her in and then nobody has to worry" about her running out the door. Exh. D-17 at 5. Appellant explained that Student E does not have an understanding of what could occur "if she would've run in front of a car, or there's a lot of cars on the road, cars in the parking lot." Exh. D-17 at 3. According to Appellant, "that's kind of where my mind was in, uh doing that." Appellant explained that, "after looking at the video," she "would not choose to move her in the way that I did. . . . I would've given her a longer period of time and hoped that she didn't run

away again. And, and try and leave the building. But that was my fear, you know, um, of, of what would happen." Exh. D-17 at 3.

66. Appellant explained that, in addition to her concern about Student E running out of the school, Appellant was "scared" and "concerned" that Student E was lying on the floor, and she had a "long history" of "self-injurious behavior to her head." Exh. D-17 at 2-3. Appellant explained, "So I thought safety-wise, that if we could get her, just slide her into that conference room, there's carpeting in there, and that, that also might be safer for her." Exh. D-17 at 3.

67. Principal Rojas asked Appellant why it appeared in the video that she was "looking behind" her before she "pulled the child by the legs." Exh. D-17 at 8. Appellant responded that there were two teachers "just standing and staring" at Student E. Exh. D-17 at 8. Appellant told Principal Rojas that she believed that if she turned and looked right at them, "they would leave." Exh. D-17 at 9. Earlier in the due process meeting, Appellant had explained that she "care[s] very much for these kids." Exh. D-17 at 6. She explained, "I love kids with autism [and] care very much for them. And that dignity piece is important to me too. It was more from that standpoint, that dignity piece . . . they're not a side show to be watched and judged when they're having a hard time." Exh. D-17 at 6.

68. Appellant also told Principal Rojas and Haats that after the interaction with Student E she met with Amy DeCoster, the Support Specialist/Autism Consultant for Imlay. Appellant told Principal Rojas and Haats that she asked DeCoster to debrief with her so that they "could really talk about and think about how this could be prevented in the future." Exh. D-17 at 7. Appellant explained that DeCoster suggested that part of the problem was that Student E and her siblings were not often allowed outside at home. As a method to decrease the instances of Student E running from the school building, DeCoster suggested that a special education

assistant could stay outside with her, let her get exercise, and allow her to wear off some of her anxious energy that resulted in her getting upset. Exh. D-17 at 5. DeCoster also suggested having Chan come out and work through some of the issues. Appellant described Chan as having "been very helpful" when Chan had consulted in the past. Exh. D-17 at 5.

69. Appellant acknowledged to Haats and Principal Rojas that the incident "was not perfect Safety Care." Exh. D-17 at 4. She stated that if she "could reverse back to that day and do it again, I would do it differently." Exh. D-17 at 8. "I've just, we've just had so many instances of her rolling and getting . . . it was just so close to the door too. I was just concerned for her safety." Exh. D-17 at 8.

The Events of May 2, 2023

70. On May 2, 2023, Principal Rojas, working with his supervisor, Lindsay Garcia, prepared his own incident report because he believed the incident report should describe the April 19 event more accurately than the incident reports prepared by Appellant. Tr. 326:3-21. In Principal Rojas's report, under "PPI used," Principal Rojas unchecked "Supportive Guide" and "Person Stability Hold," and instead checked "Other." Principal Rojas described the restraint as "Holding the student's arms, pulling towards staff. When the student drops to the floor, one staff member holds both legs and pulls the student into the conference room. Two other staff members hold the student's wrists/arms to move the student into the conference room." Exh. D-13 at 2. In response to the question, "Why was the use of Restraint/Seclusion necessary?" Principal Rojas wrote, "Staff indicated that the student was not calm and was pushing and hitting staff. She was dysregulated in the hall and staff made the decision to restrain and seclude." *Id.*

71. Principal Rojas provided a copy of his report to Student E's parents. Tr. 327:2-4. Student E's parents have not complained or expressed concerns about the information in the incident report. Tr. 373:3-10.

72. In a two-page document entitled "Investigation Summary," dated May 2, 2023, Haats described the events that precipitated the investigation, the investigation process and findings, and his conclusion. Exh. D-19.

73. The Investigation Summary indicates that, apart from review of pertinent documents and the video of the event, the investigation consisted of two interviews of staff members and "due process" meetings for Appellant, YA, and AK.[6] Haats also considered the fact that Appellant was "decertified" from Safety Care. Exh. D-24 at 2. Linda Chan ultimately notified Appellant of the revocation of her Safety Care certification on May 4, 2023, as described below.

74. Based on the investigation, Haats reached the following findings, explained in the Investigation Summary:

> "The video recording shows a 4 minute stretch of time that occurred during and just following student dismissal. In the video, the student is seen trying to run away from the staff involved. She is stopped on two occasions and lies on the floor. The student is then physically moved to the hallway just outside of a conference room where she throws herself on the floor. The video recording of the incident shows multiple times in which Ms. Hallquist and the assistants under her direction make inappropriate contact with the student including the grabbing of her arms and wrists. It also shows Ms. Hallquist dragging the student several feet across the floor by her ankles, which is not considered a Safety Care hold, and partially into the conference room. At this point, the student is physically pushed into the room and forced to remain there." Exh. D-19.

[6] Transcripts or summaries of the interviews of two staff members are not in the record. The panelists conclude that the reference in the Investigation Summary to the interviews refer to the written statements Principal Rojas obtained from Amber Owens and Tammy Biddington (who testified that she was not interviewed).

75. The Investigation Summary concluded, "The egregious and concerning nature of the physical interactions with the student and the clear, indisputable evidence in the video recording, witness statements and Appellant's due process meeting, enable me to conclude that her behavior was inappropriate, unprofessional, inexcusable, and could have easily resulted in serious injury."

76. Haats concluded in the Investigation Summary that Appellant had violated Teacher Standards and Practices Commission (TSPC) Rule 584-020-0040 (relating to gross neglect of duty), the TSPC Standards for Competent and Ethical Performance by Oregon Educators, District Policy GABA (Standards of Ethical Professional Performance), and District Policy GCAA (Standards for Competent and Ethical Performance of Oregon Educators). Exh. D-19 at 2.

Revocation of Appellant's Safety Care Certification

77. Chan received a copy of an incident report prepared by Appellant for the April 19 interaction with Student E. Tr. 89:25-90:1. Chan received all incident reports generated in the District, typically an average of eight to ten incident reports per month. Tr. 89:22-23. However, Chan did not receive a copy of the incident report prepared by Principal Rojas. Tr. 143:21-24.

78. Chan testified that a team consisting of Lisa Stockbridge; Executive Director of Student Services Elaine Fox; Director of Student Services Chelsea Pollack; and Director of Student Services Wendy Ramos decided to revoke Appellant's Safety Care certification. Tr. 135:3-138:4. Appellant's one-year Safety Care certification was scheduled to expire on April 25, 2023. Exh. A-1 at 8.

79. In a memorandum dated May 4, 2023, Chan notified Appellant that the "HSD Student Intervention Systems trainer [*i.e.*, Chan] "withdraws your Safety Care certification. You

will no longer be certified under the current Hillsboro School District Safety Care certificate." Exh. D-21 at 2.

80. The May 4 memorandum identified the following physical restraints that the memorandum described as "not approved Safety Care physical management applications":

> "Inappropriate grabbing of student's arm **NOT** using **the closed hand** when making physical contact with student.
>
> "Pulling on student's arms with an inappropriate grip and using force to pull the student toward the conference room.
>
> "When the student dropped to the floor, you grabbed both of the student's legs by the ankle, and pulled the student into the conference room. You administered an unapproved and unauthorized transport of the student.
>
> "While the student was resisting to go into the conference room, you grabbed the student's wrist and upper arm, using force to pull the student into the room. You administered an unapproved and unauthorized transport of the student." Exh. D-21 at 1 (emphasis in original).

81. The May 4 memorandum also listed the following under the heading "Documentation: Incident Report Form":

> "Inaccurate restraints listed: Supportive Guide and 1 Person Stability Hold checked in the Incident Report form though no evidence of these restraints administered in the video.
>
> "Inappropriate physical restraints were used to transport the student into the conference room.
>
> "An inaccurate statement is listed as the reason for the necessary use of restraint. Stated that the student was not calm, pushing and hitting staff, and trying to run out the front doors of the school. None of the student behaviors were observed in the video." Exh. D-21 at 3.

82. In a memorandum dated the same day, May 4, 2023, Chan notified QBS, the vendor that provides the Safety Care training, that she was withdrawing the Safety Care certification for Appellant and the two other staff members involved in the interaction, AK and YA. Exh. D-22 at 2.

The District's Recommendation and the School District's Decision

83. Working with Lew-Williams, Rojas, and Garcia, Haats recommended to Superintendent Travis Reiman that Appellant be dismissed. Tr. 202:21-203:20; Exh. D-23. In deciding to recommend dismissal, Haats considered Appellant's lack of a disciplinary record and the physical aggressiveness of the interaction. Tr. 209:20-210:3; 210:22-25. Haats also considered Appellant's statements during the due process meeting, which Haats interpreted as indicating a lack of genuine remorse. Tr. 199:5-17; 211:1-5. Haats also considered that Appellant appeared to be directing the special education assistants in what to do. Tr. 214:6-12.

84. In a letter dated July 25, 2023, Haats notified Appellant that he was recommending dismissal to Superintendent Reiman. The letter notified Appellant that a pre-termination hearing would be scheduled for Appellant to meet with the superintendent. Haats wrote that, based on the facts before him, he found "that the egregious and concerning nature of the physical interactions with the student was inappropriate, unprofessional, inexcusable and could have easily resulted in serious injury." Exh. D-23.

85. The July 25 letter did not take into account Appellant's belief that Student E might escape the school building. It also did not take into account Appellant's multiple acknowledgements during the due process hearing that she had made an error of judgment and would not handle the situation the same way in the future.

86. In a letter dated August 18, 2023, in lieu of attending the pre-termination hearing with Superintendent Reiman, Appellant provided a written response through her counsel to Superintendent Reiman. Exh. A-3. Appellant asserted that the April 19 event was an emergency situation and that Appellant's actions were justified in the context of that emergency. Appellant asserted that the recommendation for dismissal was flawed for several reasons, including

because it did not provide information about Student E's support plan or the protocols regarding dismissal time, and because it did not accurately describe Student E's behavior, which included fighting, kicking, punching and banging her head on the floor. Exh. A-3 at 4. Appellant asserted that her actions were understandable and excusable in the emergency situation that confronted her, and dismissal was too punitive and failed to consider her excellent record as a teacher. Exh. A-3 at 5.

87. In a letter dated September 27, 2023, Superintendent Travis Reiman notified Appellant that he would recommend to the school board that Appellant be dismissed. Superintendent Reiman explained that Appellant was given directives through Safety Care training and her failure "to adhere to directives that were given to [Appellant] through that Safety Care training" constituted insubordination. Exh. D-1 at 5. Superintendent Reiman also explained that by moving Student E the way she did, Appellant neglected her duty as an educator because she "failed to treat [Student E] with dignity and respect as required by District policy and state law." Superintendent Reiman wrote:

> "Subjecting a student to unnecessary force is behavior that ignores the worth of the individual and fails to take into consideration that student's needs. Your behavior further demonstrates a failure to adhere to the duty to follow training that is provided to you as a requirement of your job with the District." Exh. D-1 at 5.

88. In a letter dated October 3, 2023, Superintendent Reiman notified Appellant that his recommendation would be heard by the school board on October 24, 2023. Exh. D-25.

89. On October 17, 2023, Oregon Education Association (OEA) submitted a letter to the school board on behalf of Appellant. The letter documented Appellant's reputation as a thoughtful, caring, and patient teacher of students with special needs, and included letters of support for Appellant from two fourth-grade teachers and one third-grade teacher at Imlay. Exh.

A-4 at 8-13. OEA's letter pointed out Appellant's excellent employment record. OEA also asserted that the District had failed "to take into account the dynamic nature of the event and the choices that had to be made at that moment." OEA asserted that the characterization of the event in the recommendation for dismissal excluded key contextual information about the event and Student E's support plan and protocols. OEA also argued that the recommendation for dismissal may have been motivated by Appellant's use of legally protected medical leave. Exh. A-4.

90. The letter included a personal written statement by Appellant about the event. Appellant wrote:

> "In hindsight, there are other steps I could have tried to take to get E under control and keep her safe. However, in the moment I did the best I could to mitigate harm and prevent the risks that were in the front of my mind—protecting her from foot traffic in the school and from car traffic should she get out of the building. E is very fast and unpredictable. She had broken away from the [special education assistants] on at least two occasions during this event and I was afraid of what would happen should she break free again." Exh. A-4 at 17.

91. The school board considered the recommendation at its October 24, 2023 meeting. Exh. D-26. The board watched the video of the April 19 interaction with Student E. Tr. 301:24-301:4. Appellant was present during the board meeting. Tr. 309:9-12. The board accepted the superintendent's recommendation and dismissed Appellant on the statutory grounds of insubordination and neglect of duty.

92. On October 30, 2023, Hillsboro School District Board of Directors Chair Mark Watson notified Appellant by letter that she was terminated, effective October 24, 2023. Exh. D-26.

93. Special education assistants YA and AK resigned their employment in lieu of possible dismissal. Tr. 203:21-204:1.

94. Haats testified that he is aware of an incident, which occurred after April 19, 2023, in which a school counselor held a student by the student's wrists, resulting in the student "dangling." Tr. 284:7-17. A second student was also involved in helping to move the student. Tr. 287:25-288:6. In that incident, according to Haats, the counselor used physical management to get the student to class. Tr. 296:18-297:5. At hearing, Haats acknowledged that it is never appropriate for an educator to involve a student in an attempt to secure another student's compliance. Tr. 297:11-14. The counselor received a letter of reprimand. Tr. 285:23-25. Haats testified that the counselor received written discipline because he was extremely remorseful and because his conduct was less aggressive than Appellant's conduct. Tr. 288:15-289:7.

95. Haats also testified that the District has disciplined, but not dismissed, other educators for physically restraining students. Haats testified that "staff grab students by the hand and pull them into a classroom, pull them across the playground. We've had teachers grab students under the arms and move them into a chair. For those incidents we've issued discipline, we haven't dismissed." Tr. 289:18-23.

CONCLUSIONS OF LAW

1. The District is a "fair dismissal district" under the Accountability for Schools for the 21st Century Law. Appellant is a "contract teacher" entitled to a hearing before this panel.

2. The factual allegation that Appellant received Safety Care training before April 19, 2023 is true and correct.

3. The factual allegations that Student E, a student highly impacted by autism, was in the school hallway on April 19, 2023 during and after dismissal time, screaming, intermittently kicking her legs against the floor, and intermittently using her hands to strike her forehead are true and substantiated.

4. The factual allegation that Appellant, while Student E was lying on the polished hallway floor, held Student E's calves and slid her approximately a foot to several feet to the entrance to the conference room is true and correct.

5. The factual allegation that Appellant, along with two special education assistants, physically moved Student E into the conference room, Student E's "safe spot," by sitting her up and pushing her into the conference room to provide her with an opportunity to calm down, is true and correct.

6. The true and substantiated facts are not adequate to support the charge of insubordination as a ground for dismissal.

7. The true and substantiated facts are adequate to support the charge of neglect of duty as a ground for dismissal.

8. The dismissal of Appellant was unreasonable and clearly an excessive remedy for the reasons described in this opinion.

DISCUSSION

I. Applicable Legal Standard.

In Oregon, the permissible grounds for terminating a contract teacher are as follows:

(a) Inefficiency;

(b) Immorality;

(c) Insubordination;

(d) Neglect of duty, including duties specified by written rule;

(e) Physical or mental incapacity;

(f) Conviction of a felony or of a crime according to the provisions of ORS 342.143;

(g) Inadequate performance;

(h) Failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth; or

(i) Any cause which constitutes grounds for the revocation of such contract teacher's teaching license.

ORS 342.865. At the conclusion of a hearing appealing a District's dismissal decision, the panel reviews the evidence pursuant to the legal standard set forth in ORS 342.905(6), which provides:

> The Fair Dismissal Appeals Board panel shall determine whether the facts relied upon to support the statutory grounds cited for dismissal or nonextension are true and substantiated. If the panel finds these facts true and substantiated, it shall then consider whether such facts, in light of all the circumstances and additional facts developed at the hearing that are relevant to the statutory standards in ORS 342.865(1), are adequate to justify the statutory grounds cited. In making such determination, the panel shall consider all reasonable written rules, policies and standards of performance adopted by the school district board unless it finds that such rules, policies, and standards have been so inconsistently applied as to amount to arbitrariness. The panel shall not reverse the dismissal or nonextension if it finds the facts relied upon are true and substantiated unless it determines, in light of all the evidence and for reasons stated with specificity in its findings and order, that the dismissal or nonextension was unreasonable, arbitrary, or clearly an excessive remedy.

ORS 342.905(6). The "degree of proof of all factual determinations by the panel shall be based on the preponderance of the evidence standard." OAR 586-030-0055(5). At the hearing, evidence of "a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs" is admissible. OAR 586-030-0055(1). Thus, ORS 342.905(6) creates a three-step review process this panel must follow:

> First, the [FDAB] panel determines whether the facts upon which the school board relied are true and substantiated. Second, the panel determines whether the facts found to be true and substantiated constitute a statutory basis for dismissal. Third, even if the facts constitute a statutory basis for dismissal, the panel may reverse the school board's dismissal decision if the decision nonetheless was 'unreasonable, arbitrary[,] or clearly an excessive remedy.'

Bergerson v. Salem-Keizer School District, 341 Or 401, 412 (2006) (footnote omitted). If the panel determines "the facts are not true and substantiated, or even if true and substantiated, are not relevant or adequate to justify the statutory grounds cited by the District, the appellant shall be reinstated with any back pay that is awarded in the order." OAR 586-030-0070(3).

II. The True and Substantiated Facts Are Not Adequate To Justify the Statutory Ground of Insubordination.

The panel concludes that the true and substantiated facts are not adequate to support dismissal on the basis of insubordination. Insubordination within the meaning of ORS 342.865(1)(c) means "disobedience of a direct order or unwillingness to submit to authority," and must be accompanied by a defiant intent or attitude on the part of the teacher. *Bellairs v. Beaverton Sch. District*, 206 Or App 186, 199, 136 P3d 93 (2006). To establish insubordination, there must be credible evidence that the District imposed a lawful order or directive, that it clearly communicated that order or directive, and that the teacher willfully refused to obey the order. *Sherman v. Multnomah Education Service Dist*., FDA-95-4, 22-23 (1996). A mere "violation of policies in and of itself" does not constitute insubordination. *Bartsch v. Elkton School District*, FDA-13-011 at 26 (2013) (explaining that insubordination requires a defiant intent and clear communication of an order and noting that school policies are not "orders").

Here, the District did not clearly communicate to Appellant an order or directive that she could not, in the circumstances she confronted on April 19, 2023, physically move Student E. Rather, the District's policies and the Safety Care training require District employees to make nuanced, fact-specific judgments in the moment about the risk of harm to the particular student and the risk of not intervening in the particular situation. Specifically, the District's policy on restraint and seclusion permits restraint only when a student's behavior poses a reasonable risk of imminent and substantial physical or bodily injury to the student or others, and less restrictive

interventions would not be effective. Exh. D-2 at 2. The Safety Care training likewise requires District employees to make fact-specific judgments in the moment about whether there is an imminent risk of serious harm to the student, whether there is no other practical alternative, and whether the risk of not intervening is greater than the risk of intervening. Exh. D-3 at 135. Similarly, the District's Policy GABA and Policy GCAA require compliance with broad principles, such as dealing "justly and considerately with each student," using "professional judgment," and "recognizing the worth and dignity of all persons."

The panel concludes that these policies and the Safety Care training did not, in the particular circumstances of this case, constitute a specific directive or order to Appellant to take or refrain from taking a specific action, and therefore are not directives or orders within the meaning of FDAB's caselaw. Rather, the policies and training require District employees to make nuanced, fact-specific judgments in the moment. Although Appellant made what this panel ultimately concludes was an erroneous judgment, this panel does not find that she disobeyed an order or directive.

Moreover, even if the District's policies and training do rise to the level of a clear directive or order, there is no persuasive evidence that Appellant acted with a defiant intent or attitude. Appellant's actions after the event show that she promptly reported the event and sought help to avoid a similar situation in the future. Specifically, Appellant completed an incident report after the event, as required, and supplemented the report after she realized that she had been too rushed. Further, she initiated a consultation with Amy DeCoster about how to work with Student E in similar circumstances to avoid repeating an interaction similar to the April 19 interaction. In her "due process" meeting and in her statement to the school board, Appellant acknowledged that her conduct was fell short of the principles communicated by Safety Care

training. These facts demonstrate that Appellant made an incorrect judgment that departed from the District's Safety Care training and the District's interpretation of its policies. But that judgment, in this panel's view, is more accurately characterized as a mistake (albeit a serious one) rather than an act of defiance. On this record, the panel concludes that the District did not prove that Appellant had a defiant intent or attitude, as required to prove insubordination as a basis for dismissal.

For these reasons, the panel concludes that the true and substantiated facts do not support dismissal on the basis of insubordination.

III. The True and Substantiated Facts Are Adequate to Justify the Statutory Ground of Neglect of Duty.

The panel concludes the District established facts adequate to support the statutory ground of neglect of duty. The Fair Dismissal Appeals Board has defined neglect of duty to mean a teacher's failure to engage in conduct designed to bring about a performance of his or her responsibilities, either by engaging in "repeated failures to perform duties of relatively minor importance" or "a single instance of failure to perform a critical duty." *Meier v. Salem-Keizer School District*, FDA-13-01 at 30 (2013), *aff'd*, 284 Or App 497, 508-509 (2017), *rev den*, 362 Or 175 (2017). Because the conduct at issue here does not involve repeated conduct, the panel examines whether Appellant has engaged in a "single instance of failure to perform a critical duty" as that concept has been understood and applied in prior panel decisions.

Here, it is undisputed that the District has a policy that permits the physical movement or management of students only when a student's behavior poses a reasonable risk of imminent and substantial physical or bodily injury to the student or others, and less restrictive interventions would not be appropriate. *See* District Policy JGAB, Use of Restraint and Seclusion, Exh. D-2 at 2. That standard was also communicated in the District's Safety Care training, which Appellant

received three times. The Safety Care training emphasized an exacting standard—that is, in the District, physical management is permitted only when (1) there is imminent risk of serious harm to the agitated person or someone else, (2) there is no other practical way to prevent the harm without physical management, and (3) the risk of not intervening is greater than the risk of intervening. Exh. D-3 at 135. The panel does not understand Appellant to be disputing that the District had this policy and this training, and that they imposed a critical duty on teachers.

The evidence in this case demonstrates that Appellant, although she acted in subjective good faith, neglected this duty. To be sure, initially, during the first few minutes after Appellant first joined YA and Student E in the hallway, Student E attempted several times to break into a run. During those moments, only Appellant and YA were present to attempt to keep Student E from running out of the building. If Student E had eluded them during those moments, Appellant and YA would have had to deal with crowds of other students in the hallway in their attempt to keep Student E safe. At those moments in the interaction, it is understandable that Appellant would reasonably be concerned that Student E was at imminent risk of running out of the school building and toward potential harm.

However, moments later, when Appellant decided to physically restrain Student E and slide her by her legs into the conference room, the situation was different. At *that* moment, AK—the special education assistant who had the most reliable ability to calm Student E—had joined Appellant and YA, so there were three employees in a group working together to help keep Student E safe. At the moment that Appellant decided to restraint Student E by her legs, the crowds of students that had earlier clogged the hallways had left the building. If Student E had attempted at that moment to break away and run, it would have been easier for Appellant, YA, and AK to surround her and prevent her from leaving the building, as they had done just moments

earlier. And, most significantly, at the time Appellant decided to hold Student E's calves and slide her to the conference room door, Student E was lying on the floor, generally still. She was not, at *that* moment, showing signs of seriously harming herself. Appellant, as an experienced teacher who had received annual Safety Care training three times, should have known that she should have let Student E calm down on the hallway floor. In other words, at the relevant moment, there were practical alternatives to physical restraint: To prevent Student E from running, Appellant and the special education assistants could have remained in a group surrounding her, and to prevent her from harming herself, they could have placed her backpack or jacket under her head.

Notably, the environmental factors that may have contributed to Student E becoming dysregulated at the beginning of the interaction, including the movement and noise of the crowd of students in the hallway during dismissal, had disappeared. The Safety Care training expressly trains District employees that physical management may not be used "because de-escalation is taking 'too long.'" Exh. D-3 at 135. With the crowds dispersed, Appellant could simply have waited in the hallway with Student E until she became calm.

Those practical actions, if Appellant had taken them, would have been consistent with Student E's Response Plan for Level 4 behaviors (behaviors, such as screaming and crying, that do not allow staff to engage safety with student.). Exh. D-8. The Response Plan requires staff to create space between Student E and other students, avoid vocal directions or talking, and offer coloring using half sheets of paper. *Id.* Those actions were all available to Appellant and the two special education assistants at that moment. They did not take those actions. Rather, Appellant grabbed Student E's calves and then participated in physically moving Student E through the doorway into her "safe spot."

In taking none of these alternative actions—either taking the actions listed in the Response Plan or simply letting time pass until Student E calmed down—Appellant neglected a critical duty.

In keeping with previous FDAB cases involving neglect of duty, the panel also examines the degree of intentionality or "fault" on the part of the teacher engaged in problematic conduct. *See Wilson v. Grants Pass School District*, FDA 04-07 at 10 (2008), *citing Enfield v. Salem-Keizer School District*, FDA 91-1 (1992), *aff'd without opinion*, 118 Or App 162 (1993), *rev den* 316 Or 142 (1993). Many neglect of duty cases concern an underlying act that involves some type of intentionality or wrongdoing, designed to injure or harm someone else. *See, e.g*. *Kristen Kibbee v. Bethel School District*, FDA 13-09 (2013) (dismissal of administrator for neglect of duty upheld where administrator with prior history of discipline, grabbed a student's forearm in frustration and then initially lied to her supervisor about the incident); *Thomas v. Cascade Union High School No. 5*, FDA 84-7 (1987) (dismissal of teacher for neglect of duty upheld, where the teacher reacted to a student who had thrown a ball at her by intentionally kicking the student in anger); *Thyfault v. Pendleton School District*, FDA 90-4 (1992) (dismissal of teacher for neglect of duty upheld, where teacher forcefully spanked, grabbed and pulled student in anger); *Webster v. Columbia Education School District*, FDA 96-1 (1998) (neglect of duty upheld for teacher who purchased narcotic drugs on campus and then lied); *Bergerson v. Salem-Keizer School Distr*., 194 Or App 301, 324 (2004) (neglect of duty found where educator intentionally drove her van into estranged husband's truck).

Here, although this is a close case, the panel concludes that the District met its burden to offer persuasive evidence relating to Appellant's "fault." The panel is persuaded that Appellant's decision to grab Student E's calves, slide her across the floor (even for a foot or several feet), and

then physically force her through the conference room, rises to the level of fault. Significantly, before grabbing Student E's calves, Appellant had the presence of mind to turn away and look at the teachers she believed were at the end of the hallway to signal that they should not be staring at Student E. That action shows that Appellant was aware of the situation and the surroundings and had sufficient presence of mind to make a thoughtful decision. Just as Appellant took time to look down the hallway in an attempt to avoid shame for Student E, she could have and should have paused and considered whether the prerequisites for physical management were present in the situation she faced. This panel finds that Appellant's failure to pause and consider alternatives, and consequent decision to physically move Student E, rises to the level of fault in the context of the FDAB's neglect of duty caselaw.

In reaching this conclusion, the panel notes that it is not persuaded that Appellant's action in looking down the hall before she grabbed Student E's calves demonstrates that Appellant was aware that she was acting improperly, as the District argued. Rather, the panel finds that Appellant reasonably believed that there were adults at the end of the hallway. The panel finds that Appellant wanted to protect Student E's dignity by signaling to them that they should disperse.[7] Likewise, the panel is not persuaded that Appellant prepared the initial incident report with an intent to downplay the seriousness of the restraint, as the District suggested. Instead, the panel believes that Appellant was credible when she testified that she was rushed when she prepared the form. Appellant's action in completing a second incident report to add details about the event supports that conclusion.

[7] The panel notes that there is no evidence, and no argument by the District, that Appellant used her hands on Student E's calves or physically moved her into the conference room out of anger or with any intention to harm her. To the contrary, the panel is persuaded by Appellant's credible testimony that she cared for Student E's well-being and wanted to prevent harm to her.

For all the reasons discussed above, although this is a close case, the panel concludes that the District met its burden to demonstrate that Appellant neglected a critical duty on April 19, 2023 when she grabbed Student E by the calves, slid Student E a foot to several feet over the hallway floor, and physically moved her into a conference room.

IV. The Dismissal Decision Was Unreasonable and Clearly an Excessive Remedy.

Because the panel finds that the true and substantiated facts are adequate to support the statutory ground of neglect of duty, the panel next considers whether the dismissal was arbitrary, unreasonable, or clearly an excessive remedy. If so, the panel may reverse the dismissal for reasons stated with specificity in this opinion. ORS 342.905(6). When the facts justify the grounds stated for dismissal, however, the panel may engage in "only a deferential review" of the school board's decision to dismiss. *Ross v. Springfield Sch. Dist*., 294 Or 357, 363 (1982). The panel may not set aside a dismissal unless it can say, as a matter of law, that no reasonable school board would have found the relevant facts sufficient for dismissal. *Bergerson*, 194 Or App at 313, *aff'd*, 341 Or 401 (2006); *Lincoln County Sch. Dist. v. Mayer*, 39 Or App 99 (1979).

This majority of the panel finds, in light of all the evidence, that the school board's dismissal of Appellant was unreasonable and clearly an excessive remedy for the following reasons.

To begin, the majority finds that the District's investigation was insufficiently thorough. The investigation summary indicates that two witnesses were interviewed and that Appellant and the special education assistants received "due process" meetings—meaning that accounts of the event were obtained from five witnesses. However, at least six to eight witnesses saw or were involved in some portion of the event: Appellant, YA, AK, Owens, Biddington, the teacher who directed the other students in the hallway away from Student E, and the teachers at the end of the hallway in the seconds before Appellant slid Student E across the floor. In addition to those staff

members, there were other adults in the hallway at various points in the longer interaction with Student E, and the District did not attempt to gather information from them.

Moreover, transcripts or summaries of the witness "interviews" are not in the record, leaving the majority to conclude that the reference to witness "interviews" is a reference to the written statements of Owens and Biddington. A written statement from a witness may in many circumstances be adequate. Under the circumstances of this case, however, where the disciplinary penalty is ultimately dismissal of an experienced teacher with no prior disciplinary record, the majority concludes that the District should have conducted a more searching inquiry, including interviewing more witnesses who saw the interaction between Appellant and the special education assistants on April 19, 2023.

The majority also finds that the dismissal decision unreasonably took into account the District's decision to "decertify" Appellant's Safety Care certification. It is undisputed that Superintendent Reiman, in reaching his recommendation, considered the fact that Appellant's Safety Care certification "necessary for maintaining your position" was "withdrawn." Exh. D-1 at 2. That "decertification" decision was made by Linda Chan and her colleagues. However, Chan acknowledged at hearing that she did not know that Student E had a special education assistant assigned to her at all times, that the conference room was Student E's "safe spot," that the conference room was carpeted, and that Student E had a history of running out of the school building. Further, there is no evidence in the record that Chan and her colleagues interviewed any witnesses or gathered any facts, other than reviewing the video and incident report, before making the decision to "decertify" Appellant. Despite that lack of factual review and lack of knowledge about the factual context of the April 19 event by the District employees who decided to decertify Appellant, the dismissal decision is nevertheless grounded, in part, on the

decertification decision. The majority finds that reliance on the Safety Care "decertification" as part of the reason for dismissal (even if it was only a small part) compounded the insufficiently thorough investigation.

In addition to those factors, the majority also finds that dismissal is unreasonable and clearly an excessive remedy in light of the following facts. The majority finds that there is no evidence that Appellant acted in anger or with any intent to harm Student E. The majority finds that Appellant acted only with an intent to protect Student E from possible harm. Further, Appellant acknowledged her error and showed remorse for her actions. And, until April 19, 2023, Appellant had an excellent employment record and no prior discipline.

Finally, in addition to all the reasons described above, dismissal in this case is unreasonable and clearly an excessive remedy in light of the District's discipline of educators in other cases. The record indicates that the District has issued discipline, but not dismissal, in circumstances in which educators have grabbed "students by the hand and pull[ed] them into a classroom, pull[ed] them across the playground" and have grabbed "students under the arms and move[d] them into a chair." Tr. 289:18-22. Appellant's dismissal, given all the particular circumstances in this case, is unreasonable and clearly an excessive remedy where the evidence indicates that the District has issued more lenient discipline in other cases involving similar physical management of students. Further, the unrebutted evidence about an incident *after* April 23, 2019, in which a counselor at another school was merely reprimanded after grabbing a student by the wrist, resulting in the student "dangling," confirms this conclusion.

In sum, for all the reasons identified above, the majority of the panel finds that the dismissal in this case was unreasonable and clearly an excessive remedy. The majority therefore reverses the District's disciplinary decision.

ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to her position with six months' back pay.

DATED this 19th day of July, 2024

/s/ Robert Scone
Robert Sconce, Panel Chair

DATED this 19th day of July, 2024

/s/ Ron Gallinat
Ron Gallinat, Panelist

Panelist James Westrick, concurring in part and dissenting in part:

I agree with the panelists in the majority that the true and substantiated facts are adequate to support dismissal based on the statutory ground of neglect of duty. I also agree that this is a close case and that there were flaws in the District's investigation of the facts. However, under the governing legal standard, an FDAB panel may not set aside a dismissal unless it can say, as a matter of law, that no reasonable school board would have found the relevant facts sufficient for dismissal. I cannot say, given all the facts in this case, that no reasonable school board would have dismissed the Appellant. Therefore, I respectfully dissent from the portion of the opinion concluding that the dismissal in this case was unreasonable and clearly an excessive remedy, and I respectfully dissent from the order reinstating Appellant.

DATED this 19th day of July, 2024

/s/ James Westrick
James Westrick, Panelist

Notice: Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on July 19th, 2024, I served a true and correct copy of

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER by email:

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