2019 IL App (1st) 18-0611-U

No. 1-18-0611

Order filed May 30, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MARIA FLORES, Petitioner-Appellant, v. THE BOARD OF EDUCATION OF THE CITY OF CHICAGO; JANICE JACKSON, Chief Executive Officer of the Chicago Public Schools; LISA SALKOVITZ KOHN, Hearing Officer; and THE ILLINOIS STATE BOARD OF EDUCATION, Respondents-Appellees.	)	Petition for Review of an Order of the Board of Education of the City of Chicago No. 18 0228 RS5

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: We confirm the decision of the Board of Education of the City of Chicago that dismissed petitioner's employment as a tenured teacher where the Board did not inadequately provide notice to the teacher about the charges against her, the Board's findings were not against the manifest weight of the evidence, and the Board's ultimate conclusion that petitioner's conduct was irremediable was not against the manifest weight of the evidence.

¶ 2 The Board of Education of the City of Chicago (the Board) terminated the employment of Maria Flores after a dismissal hearing from which the Board adopted the hearing officer's findings that Flores violated several corrective action categories of the Chicago Public Schools, a Board resolution and multiple Illinois State Board of Education rules and regulations, all based on several allegations of conduct toward and in connection with a six-year-old student, D.F. Flores has petitioned for review directly to this district of the appellate court as provided by section 34-85(a)(8) of the School Code (105 ILCS 5/34-85(a)(8) (West 2016)) and Illinois Supreme Court Rule 335 (eff. July 1, 2017), where she raises several contentions of error made by the Board in reaching its decision to terminate her employment. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Board's Charges

¶ 5 Petitioner Maria Flores was a tenured teacher employed at Robert Nathaniel Dett Elementary School (Dett Elementary School), a part of the Chicago Public Schools, where she had taught since 2013.

¶ 6 On August 3, 2016, the Chief Executive Officer (CEO) of the Chicago Public Schools, at the time Forrest Claypool, notified Flores in writing that he had approved dismissal charges against her for:

> "1. Violating Corrective Action Category 'Performance: Failure to Perform Duties,' which prohibits the failure to perform duties.
>
> 2. Violating Corrective Action Category 'Performance: Negligence/Incompetence – Students,' which prohibits the failure to act in the manner of a reasonably prudent educator in the supervision of students.

3. Violating Corrective Action Category 'Performance: Negligence/Incompetence – Other Duties,' which prohibits any negligently or incompetently performed act in connection with duties.

4. Violating Corrective Action Category 'Performance: Insubordination,' which prohibits the refusal to carry out a directive from a supervisor.

5. Violating Corrective Action Category 'Physical Integrity: Corporal Punishment (Physical Contact),' which prohibits punishment of students.

6. Violating Corrective Action Category 'Physical Integrity: Physical Abuse,' which prohibits abusive physical contact with students.

7. Violating Corrective Action Category 'Verbal Abuse,' which prohibits verbally abusive language to or in front of students.

8. Violating Corrective Action Category 'Policy Compliance (including rules, policies and procedures): Policy Non-Compliance – Students,' which prohibits the failure to follow Board policies concerning Students.

9. Violation of Board Resolution 04-0728-RS2 which prohibits, amongst other acts of misconduct, corporal punishment that results in the deliberate use of physical force with a student in violation of Section 4-25 of the Policy's Acts of Misconduct Section.

10. Violation of the Illinois State Board of Education Rules and Regulations Code of Ethics, 22.10-20 of Title 23, which requires Illinois educators to be responsible to:

a. Students
b. Self
c. Colleagues and the Profession
d. Parents, Families, and Communities; and
e. Illinois State Board of Education.

11. Violation of the Illinois State Board of Education Rules and Regulations Standards for All Illinois Teachers, 24.130 of Title 23, which outlines the Illinois Professional Teaching Standards.

12. Conduct unbecoming a Chicago Public Schools employee."

¶ 7 The CEO set forth eight "Specifications" supporting the charges against Flores. Specifically, the CEO asserted that Flores was a teacher at Dett Elementary School during the relevant time period (Specification 1). The CEO next alleged that, prior to March 16, 2016, Flores was warned, counseled and disciplined for failing to complete Antecedent-Behavior-Consequence charts, rating scales, or anecdotal records to document and collect data concerning D.F.'s behavior (Specification 2). Additionally, the CEO alleged that, on or about March 16, 2016, Flores used inappropriate language toward D.F. (Specification 3), grabbed D.F. and dragged him out of a classroom (Specification 4), and tossed D.F. toward the school's principal (Specification 5). The CEO further alleged that Flores then began yelling and screaming at the principal in the hallway for approximately five minutes, which disrupted all of the classrooms on the first floor (Specification 6). The CEO alleged that, afterward, Flores violated a directive to go into the counseling office to calm down and instead, she said she was not leaving until the police arrive (Specification 7). The CEO asserted that Flores' conduct was unbecoming of a Chicago Public Schools employee (Specification 8). And based on these specifications, the CEO contended that dismissal was warranted due to her irremediable conduct.

¶ 8 The following week, a pre-suspension hearing occurred, and Flores was suspended without pay. Flores requested a hearing on the charges and specifications brought against her before a mutually selected hearing officer.

¶ 9 B. Hearing

¶ 10 Eventually, a hearing occurred on May 15, 2017, before Illinois State Board of Education (ISBE) hearing officer Lisa Salkovitz Kohn. At the hearing, several people testified, including Marcus Thomas, a security officer at Dett Elementary School, Jacqueline Cuisinier, a counselor

and case manager at Dett Elementary School, Dr. LaMonica Williams, the principal at Dett Elementary School, and Flores herself.

¶ 11 The evidence revealed that Flores had been a teacher with the Chicago Public Schools since 1999, initially at Herzl Elementary School, where she taught for four years before moving around to different schools. Flores began teaching at Dett Elementary School in 2013. Throughout her time with the Chicago Public Schools, Flores had never received any formal reprimands or been in trouble. During the 2014-2015 school year, Flores taught kindergarten at Dett Elementary School. Dr. Williams performed an evaluation of Flores that school year and gave her an overall rating of "developing." In the evaluation, Dr. Williams noted that Flores needed significant work in multiple categories, including classroom management procedures and creating an environment of respect and rapport, all primarily due to the chaotic atmosphere permeating her classroom where she and her students frequently would talk over one another.

¶ 12 During the 2015-2016 school year, Flores initially taught Spanish, but because of a budget issue, she was moved to a kindergarten classroom with 14 to 16 students. According to Flores, when issues would occur with her students, she would e-mail Dr. Williams with notes or call the students' parents herself, and Dr. Williams never disapproved of her methods.

¶ 13 That school year, one of her students was six-year-old D.F., who was in foster care and at a prior school had behavioral issues. Flores described him as very smart and always ready to do the school work, but, at times, he would "suddenly" become aggressive. When D.F. would become aggressive, Flores would tell him to "please, get out" of the classroom and have D.F. enter the hallway, where she would alert Thomas as to D.F.'s behavior. Flores testified adamantly that she never left any student, including D.F., in the hallway alone. Dr. Williams, however, testified that Flores had on multiple occasions done so and she had reprimanded Flores

for it. Dr. Williams, however, acknowledged that she could not recall any specific dates this occurred. Additionally, Flores asserted that, when D.F. became aggressive, the balance of trying to deescalate him while also keeping her other students focused on learning was "very difficult."

¶ 14 During late October 2015, Cuisinier, Dr. Williams and Dr. Lauren Barker, the school psychologist, had a problem-solving meeting with Flores to discuss D.F.'s behavior and provide Flores with guidance on how to address it. At the meeting, Flores was provided Antecedent-Behavior-Consequence (ABC) forms, which were charts to help a teacher anecdotally document a student's behavior. According to Cuisinier, at the meeting, Flores was instructed to fill them out to document D.F.'s behavioral issues. On the ABC form, there were spaces to document the date and time of the student's behavior, the activity ongoing in the classroom when the student's behavior became an issue, the "Antecedent" or what happened before the behavior issue that may have triggered it, the "Behavior" itself and how it manifested itself, and the "Consequence" or what happened as a result of the behavior. The forms were part of an effort to collect data on D.F. to conduct a case study on his behavior so better strategies could be developed to respond to and curtail his behavior, and possibly create an individualized education program for him.

¶ 15 Over the course of fall 2015 and early winter 2016, the group met several more times to discuss D.F. During this time, Dr. Barker asked Flores to complete a behavior rating scale for D.F. in order to help her evaluation of him and provided her a due date. Dr. Barker had to continually follow up with Flores to get the forms completed and although Flores eventually completed the forms, she did so well after the original due date requested by Dr. Barker. Also during this time, Flores filled out only part of one ABC form to document two incidents involving D.F., but never completed any more forms. Flores did, however, verbally tell Cuisinier about D.F.'s behavior, which Cuisinier found sufficient for her purposes, but it was not sufficient

for Dr. Barker's evaluation of D.F. Because Flores did not complete the ABC forms, Cuisinier had to visit D.F.'s classroom on multiple occasions to observe and document D.F.'s behavior.

¶ 16 Instead of completing the ABC forms, Flores e-mailed Dr. Williams about D.F.'s behavior. In these e-mails, Flores documented instances of D.F. becoming violent and stated she was concerned about his behavior and the safety of her students. In one e-mail dated January 26, 2016, she reported that, during the day, D.F. hit a student on the back, bit a student on the arm, cursed at a paraprofessional and spat on someone's blouse. Flores concluded the e-mail requesting guidance from Dr. Williams on how to maintain the safety of the classroom.

¶ 17 Eventually, after multiple incidents involving, D.F., a meeting was held on February 9, 2016, to create a safety plan for D.F. As the name implied, the plan was intended to ensure the safety of D.F., his fellow students and school staff. According to the plan, D.F. was supposed to arrive at school at a different time than other students in order to "avoid morning disturbance." And during the day, if D.F. became agitated in the classroom or was on the verge of an aggressive tantrum, Flores was supposed to call school security immediately to have him removed from the classroom so he could deescalate outside the classroom with a school administrator or mental health professional. If, after 10 minutes, D.F. could not deescalate, the school would call a crisis mental health service. The safety plan was signed by Flores, D.F.'s legal guardian, Dr. Williams and Cuisinier. And according to Dr. Williams' testimony, Flores was directed to follow the plan.

¶ 18 On February 19, 2016, Flores wrote another e-mail to Dr. Williams regarding D.F.'s behavior. Flores noted that, since the safety plan meeting, D.F. had threatened to kill her. According to the e-mail, Flores told Cuisinier what occurred, but she simply told Flores to continue taking notes. In the e-mail, Flores noted that D.F. had also kicked and cursed at a

paraprofessional, and slapped a student on the face. Further in the e-mail, Flores reported that D.F. threatened her another time and when she went to find Cuisinier, only Keely Mendenhall, a social worker, was in the office. Flores stated that Mendenhall dismissed the incident and said she would talk to D.F. later. Flores concluded the e-mail asking "what kind of support" was needed for D.F. when he would become violent.

¶ 19 On March 7, 2016, Flores wrote another e-mail to Dr. Williams and listed several additional incidents with D.F. going as far back as November and December 2015. These incidents included him kicking, biting and scratching other students, verbally abusing other students and making threats to kill another student's mom. Flores concluded the e-mail requesting guidance on the "protocols" to follow when D.F. would become violent.

¶ 20 Despite the e-mails sent by Flores, Dr. Williams testified that Flores did not follow the safety plan. Cuisinier also testified that, based on "secondhand information," the safety plan was not consistently followed. Cuisinier explained that she was not always present when issues with D.F. arose, so she did not have much firsthand knowledge as to whether it was followed.

¶ 21 Dr. Williams testified that, in the afternoon of March 16, 2016, she encountered Flores' classroom in the hallway and observed that D.F. looked upset. Dr. Williams then went next door to Flores' classroom for a teacher meeting. However, during the meeting, Dr. Williams heard screaming and commotion in Flores' room. Dr. Williams exited the room and observed Flores dragging D.F. by his arm out of their room. Flores then "flung" D.F. toward Dr. Williams. According to Dr. Williams, D.F. was visibly upset and crying while Flores was "erratic," "out of control" and "screaming" in the hallway. As Dr. Williams was holding D.F., he tried to kick Flores, but missed. Flores continued to yell in the direction of Dr. Williams, screaming that Dr. Williams had not done anything to help her and she wanted to call the police. Dr. Williams asked

Flores "over and over again" to go to the counselor's office to calm down, but she did not go right away. Eventually, Flores came to the counselor's office, though Dr. Williams did not remember exactly how long it took. In the office, Flores told Dr. Williams that D.F. had thrown scissors at her which hit her in the chin.

¶ 22 Marcus Thomas, the school security guard, testified that his security station was located approximately 100 feet away from Flores' classroom. On March 16, 2016, he was at his desk when he heard screaming and noise coming from near Flores' classroom. As Thomas went toward the room, he observed Dr. Williams leave the room next door and go toward Flores' room. By the time he reached Flores' room, Dr. Williams had D.F. in her hands and passed him along to Thomas. He then observed Dr. Williams trying to calm Flores down, who was "very upset" and "yelling," and at one point, D.F. tried to kick Flores. According to Thomas, Flores yelled "what have you done to help me" at Dr. Williams. Thomas took D.F. to the office. At the hearing, Thomas described D.F. as a "handful" and noted that he can be "aggressive" and needed "a lot of attention." Beyond this incident, Thomas testified that he had been involved with D.F. "numerous" times and could often hear Flores yelling at D.F. due to his proximity to her classroom. Although Thomas acknowledged responding to Flores' classroom for issues with other students, he stated it did not happen "a lot." But he generally described her classroom during the 2015-2016 school year as "chaotic."

¶ 23 At the hearing, Flores provided her version of what occurred on March 16, 2016. However, she provided context for the incident earlier in her testimony, where she testified that she had been physically assaulted by D.F. multiple times, beginning in November 2015 when he kicked her. Flores asserted that, despite e-mailing Dr. Williams multiple times with descriptions of D.F.'s behavior out of concern for her and her students' safety, Dr. Williams never responded.

¶ 24 Flores testified that, early in the afternoon of March 16, her students were coming back to their classroom when D.F. was getting loud and a little out of control. Dr. Williams was in the hallway at the time and told D.F. to please be quiet. D.F. and the rest of Flores' students entered her classroom. Shortly after entering the classroom, D.F. threw a pair of scissors at Flores. In response, Flores asked D.F. to "please, get out" of the classroom. As Flores walked toward him, he refused to leave and kicked Flores in the leg. D.F. then grabbed a bucket from the classroom and ran into the hallway. Flores denied that she ever dragged D.F. into the hallway. In the hallway, according to Flores, D.F. threw the bucket at her "with all his force." At that time, Dr. Williams came into the hallway and began restraining D.F. Flores asserted that Dr. Williams observed D.F. throw the bucket at her, an assertion that Dr. Williams denied at the hearing. While Dr. Williams was restraining D.F., he tried to kick Flores again, but missed. Eventually, Dr. Williams handed D.F. to Thomas.

¶ 25 When Flores returned to her classroom, one of her students informed her that she was bleeding from her chin. Flores subsequently took a photograph of her face with her cell phone. In that photograph, which was part of the hearing exhibits, Flores can be seen with an approximately two-inch cut on the center of her chin. After realizing she had been cut, Flores opened the door to the hallway, observed Dr. Williams standing outside and asked Dr. Williams when D.F. would be removed from her classroom. According to Flores, Dr. Williams asserted that D.F. would not be removed from her classroom without an explanation.

¶ 26 Flores subsequently called a representative of the Chicago Teachers Union for advice, and she advised her to call the police, which Flores did. While waiting for the police, Dr. Williams told her to come to the counselor's office. Flores responded that no adult was supervising her classroom. She waited until an adult came to the classroom and then went to the

counselor's office. When the police arrived, Flores asked if she could file a police report for use in D.F.'s possible individualized education program. However, the police refused and said that, due to his age, she could not file a police report. Luke Daly, an investigator for the law department of the Chicago Public Schools, testified at the hearing that he investigated the March 16, 2016, incident, during which he interviewed the responding police officers. They told Daly that Flores demanded D.F. be arrested, but they refused explaining to her that it was against department policy.

¶ 27 Two days after the incident, Dr. Barker e-mailed Dr. Williams and expressed concern about Flores "following the safety plan and maintaining positive reinforcement" with D.F. to reduce his outbursts. Although Dr. Barker readily acknowledged D.F.'s behavioral issues, she added that "some of the problem here stems from a lack of appropriate classroom management."

¶ 28 Also shortly after the incident, Flores took a medical leave of absence and did not return to Dett Elementary School until early May 2016. When Flores returned, Dr. Williams removed her from her kindergarten class and assigned her to do "DIBEL" testing of students.

¶ 29 Despite the many incidents involving D.F. and Flores, Dr. Williams testified that, as a whole, she believed that D.F. liked Flores because whenever he was removed from her classroom, he was "upset" about it and would request that Flores come get him. Dr. Williams summed up her observations of Flores' attitude toward D.F. as being "very dismissive" and never having "any amount of tolerance" for him. Dr. Williams added that, despite trying to help D.F.'s behavioral issues by data collection of "anecdotal record[s]" and implementing the safety plan, Flores "did not support the evaluation of the student in any way."

¶ 30 D.F.'s behavior improved after the March 16, 2016, incident. According to Dr. Williams, since the incident and throughout the entire 2016-2017 school year, D.F. had "not had an

aggressive tantrum" or exhibited a similar level of violence. Dr. Williams added that, although D.F. was still "a handful" and would get into "some trouble," he had not reached a level where he "need[ed] to be removed from the classroom." According to Cuisinier, although D.F. was still challenging during the 2016-2017 school year, he had made progress and there were less behavioral issues than in the prior school year.

¶ 31 C. Hearing Officer's Decision

¶ 32 On January 20, 2018, the hearing officer rendered her findings and recommendation to the Board. In making these findings, the officer asserted that she found the testimony of Dr. Williams, Thomas and Cuisinier to be more credible than Flores' testimony. And based on the testimony of Dr. Williams, Thomas and Cuisinier, the officer found that the Board had proved by a preponderance of the evidence that, prior to March 16, 2016, Flores was instructed and requested to complete the ABC forms and collect data regarding D.F.'s behavior, but not that she was formally warned or disciplined for failing to complete them (Specification 2). Additionally, the officer found that the Board proved that: on March 16, 2016, Flores used inappropriate language toward D.F. by yelling at him to get out of the class (Specification 3); Flores grabbed and dragged D.F. out of the classroom and into the hallway (Specification 4); Flores threw D.F. toward Dr. Williams (Specification 5); Flores began yelling and screaming at Dr. Williams in the hallway, which resulted in the disruption of other classrooms (Specification 6); and Flores refused Dr. Williams' directive to go to the counselor's office and calm down for some period of time and instead said she was calling the police (Specification 7). And based on the Board's proof of these specifications, the officer determined that Flores' actions were sufficient to sustain the charges of violating the various Corrective Action Categories, Board Resolution 04-0728-RS2 and the ISBE Rules and Regulations.

¶ 33 Despite finding the specifications proven and the charges sustained, the hearing officer noted that she still had to determine whether Flores' conduct was irremediable. The officer first analyzed whether her conduct was irremediable *per se* under the School Code (105 ILCS 5/34-85 (West 2016)). The officer readily acknowledged that D.F. was a very difficult child and challenging to all, and when he had tantrums, he posed a danger to himself, Flores, and other students and staff. However, despite this, the officer observed that, in none of the e-mails sent by Flores to Dr. Williams did she describe any efforts she made to deescalate D.F.'s behavior, which was required by virtue of the safety plan that Flores had signed. Moreover, the officer highlighted that Flores did not cooperate with the data-collection process to allow staff to properly evaluate D.F. to ensure he received the services he needed. Instead, according to the officer, Flores drafted e-mails to Dr. Williams that "demonized D.F.'s behavior." The officer determined that Flores' conduct toward D.F. was indicative of her "simply want[ing] D.F. out of her class" and she "completely neglected her responsibility to him (as well as his fellow students) to help him control his behavior." All told, the officer determined her conduct toward D.F. was unprofessional and cruel.

¶ 34 Moreover, the hearing officer discussed the March 16, 2016, incident and found that the evidence showed D.F. was already upset before entering the classroom and, at that point, Flores should have implemented the safety plan before he threw the scissors at her. By not following the safety plan, the officer determined that she had acted negligently. Furthermore, the officer determined that Flores' "physical" handling of D.F. and her own "tantrum" about him in his presence was also negligent and cruel. While the officer noted that D.F.'s actions of throwing scissors warranted an immediate reaction from Flores to protect herself and other students, she was not justified in dragging D.F. into the hallway, throwing him at Dr. Williams and yelling

about him in his presence. Given that Flores' conduct was negligent, cruel and unprofessional in multiple respects, the officer concluded that her conduct was irremediable *per se*.

¶ 35 The hearing officer then analyzed whether Flores' conduct was irremediable under the test of *Gilliland v. Board of Education of Pleasant View Consolidated School District No. 622*, 67 Ill. 2d 143 (1977), which required the officer to determine whether: (1) damage had been done to the students, faculty or school and (2) the conduct resulting in that damage could not have been corrected had the teacher first been warned. With regard to the damage component, the officer noted that Flores' failure to complete the ABC forms created extra work for Cuisinier, who herself had to sit in on D.F.'s classroom several times to document his behavior, and hampered Dr. Barker's efforts to prepare his case study for use in evaluating his need for an individualized education program. Additionally, the officer asserted that she could reasonably assume damage to D.F. himself, who was likely traumatized by the events of March 16, 2016, including Flores' announcement that she was calling the police.

¶ 36 The hearing officer next found that there was strong evidence that, even if Flores had been given a prior warning about completing the ABC forms, she would not have completed them given her persistence in sending e-mails to Dr. Williams about D.F.'s behavior. The officer found that, in light of Flores' attitude toward D.F., she "had no intention" of supporting his evaluation effort. Furthermore, the officer observed that Flores' refusal to acknowledge certain actions of hers on March 16, 2016, showed that she had "no remorse" and "no regard for the truth about the incident." According to the officer, even if Flores had been warned not to perform the various actions she did on March 16, 2016, nothing from the record indicated that this would have prevented her "unprofessional and harmful behavior." Given the officer's finding that

Flores conduct had caused damage and could not have been corrected had she first been warned, the officer concluded that her conduct was irremediable under *Gilliland*.

¶ 37 In light of the hearing officer's finding that Flores' conduct was both irremediable *per se* and irremediable under *Gilliland*, the officer determined that sufficient cause existed to dismiss Flores and recommended dismissal.

¶ 38 C. The Board's Decision

¶ 39 On February 28, 2018, the Board adopted the findings of the hearing officer in full, accepted her recommendation to dismiss Flores and accordingly dismissed Flores from her employment.[1] Flores subsequently sought judicial review directly to this district of the appellate court pursuant to section 34-85(a)(8) of the School Code (105 ILCS 5/34-85(a)(8) (West 2018)) and Illinois Supreme Court Rule 335 (eff. July 1, 2017). Although hearing officer Lisa Salkovitz Kohn and the ISBE are appellees in this appeal and an appearance was filed on their behalf by the Illinois Attorney General, they have not filed briefs in the matter. The Board and the CEO have filed a joint brief as appellees.

¶ 40 II. ANALYSIS

¶ 41 Before addressing Flores' contentions, we briefly overview termination proceedings of tenured teachers to provide context for her claims of error.

¶ 42 Under the School Code, for cities with over 500,000 inhabitants (Chicago), no tenured teacher may be removed except for cause. 105 ILCS 5/34-85(a) (West 2016). Where the alleged cause for termination is deemed remediable, the teacher must be given reasonable written warning notifying the teacher of the alleged cause and that if the teacher does not remediate the cause, she may face dismissal charges. *Id.* Where a teacher's conduct is deemed remediable, a

[1] On February 28, 2018, Janice Jackson was the CEO of the Chicago Public Schools.

local school board is without jurisdiction to terminate the teacher on that basis. *Jackson v. Board of Education of City of Chicago*, 2016 IL App (1st) 141388, ¶ 30. However, where the alleged cause for termination is based on conduct deemed irremediable, the teacher is not entitled to any written warning prior to the dismissal charges being brought and may be dismissed for such conduct. 105 ILCS 5/34-85(a) (West 2016); see also *Younge v. Board of Education of City of Chicago*, 338 Ill. App. 3d 522, 531-34 (2003).

¶ 43 To initiate dismissal proceedings against a tenured teacher, the local school superintendent must approve the charges and specifications against the teacher. 105 ILCS 5/34-85(a)(1) (West 2016). Within 10 days of that approval, the teacher must be served with written notice of the charges and specifications against her. *Id.* Thereafter, the teacher may request a hearing before a mutually selected hearing officer. 105 ILCS 5/34-85(a)(2)-(3) (West 2016). In consultation with the Chicago Teachers Union, the Board must maintain a list of at least nine qualified hearing officers, all of whom must possess certain training and experience requirements. 105 ILCS 5/34-85(a)(3) (West 2016). The teacher and the superintendent rotate striking hearing officers until one remains. *Id.* That officer presides over the teacher's dismissal hearing and determines whether the Board has proved by a preponderance of the evidence the specifications and charges supporting dismissal. *Beggs v. Board of Education of Murphysboro Community Unit School District No. 186*, 2016 IL 120236, ¶ 53.

¶ 44 Following the hearing, the hearing officer must report her findings and a recommendation as to whether or not the teacher should be dismissed to the superintendant. 105 ILCS 5/34-85(a)(6) (West 2016). Afterward, the Board has 45 days to make its decision. 105 ILCS 5/34-85(a)(7) (West 2016). Under section 34-85(a)(8) of the School Code (105 ILCS 5/34-85(a)(8) (West 2016)), judicial review of the Board's decision is governed by the Administrative Review

Law (735 ILCS 5/3-101 *et seq.* (West 2016)) except that review must be initiated in this district of the appellate court.

¶ 45 A. Re-Writing of Specification 2

¶ 46 With that overview of termination proceedings of tenured teachers, we now address Flores' contentions. First, she contends that the Board violated the notice requirement of the School Code when it re-wrote Specification 2 after the hearing had concluded in order to support a termination finding.

¶ 47 Specification 2, as alleged in the CEO's written notice of the charges and specifications against Flores, stated that, "[p]rior to March 16, 2016, [Flores was] warned, counseled, and disciplined for failing to complete ABC charts, rating scales, or anecdotal records to document and collect data regarding male student age six (6) D.F.'s behavior." However, in terminating Flores' employment, the Board (by virtue of adopting the hearing officer's findings in whole) found Specification 2 was proven by a preponderance of the evidence, specifically that, "[p]rior to March 16, 2016, Flores was instructed and requested to complete ABC forms to document and collect data regarding D.F.'s behavior." The instruction and request to Flores to complete the ABC forms, and her failure to do so, established the basis of the Board's subsequent findings that she violated various Corrective Action Categories, including "Performance: Failure to Perform Duties," which prohibited the failure to perform duties, "Performance: Negligence/Incompetence – Other Duties," which prohibited any negligently or incompetently performed act in connection with duties, and "Performance: Insubordination," which prohibited the refusal to carry out a directive from a supervisor. According to Flores, the change in Specification 2 from how it was alleged by the CEO in the dismissal charges and to how the Board found it proved following the hearing deprived her of the notice required by the School Code.

¶ 48 A teacher's right to receive proper notice of the charges and specifications against her prior to a dismissal hearing is required by section 34-85(a)(1) of the School Code (105 ILCS 5/34-85(a)(1) (West 2016)) and axiomatically important. Not only is the notice critical in order for the teacher to prepare her defense to the charges and specifications (see *Aulwurm v. Board of Education of Murphysboro Community Unit School District No. 186*, 67 Ill. 2d 434, 436-37 (1977)), but also the notice is important to the teacher's decision in selecting an impartial hearing officer. Numerous considerations go into the teacher's decision in selecting a hearing officer. *Board of Education of City of Chicago v. State Board of Education*, 113 Ill. 2d 173, 185 (1986). "From a teacher's standpoint those considerations are likely to include, for example, the professional qualifications and prior decisions of the hearing officers, taken in conjunction with the nature of the charge and specifications." *Id.* It is such an important decision that our supreme court has held if the charges and specifications are amended to include new charges and specifications after the hearing officer has been selected, the original hearing officer cannot hear the additional charges and specifications because it would deprive the teacher of an informed hearing officer selection. *Id.*

¶ 49 However, we do not agree with Flores the Board violated the notice requirement of the School Code with regard to Specification 2. It is undeniable that Specification 2 as alleged in the dismissal charges is different than what the Board ultimately found proven with Specification 2. But the critical information contained in Specification 2 was that, prior to March 16, 2016, Flores had knowledge that she was required to complete ABC forms as well as other records to document D.F.'s behavior. Nothing about the difference between Specification 2 as alleged in the dismissal charges and the Board's finding on Specification 2 changed that. Additionally, it is well-established that, in administrative proceedings, the notice of charges does not need to be as

precise or detailed as in normal court proceedings. See *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 93 (1992). In administrative proceedings, the notice "need only reasonably advise the respondent as to the charges so that he or she will intelligently be able to prepare a defense." *Id.* Here, despite the change with Specification 2, Flores undoubtedly was still able to intelligently prepare a defense against the specification, and she cannot credibly argue that the change deprived her of an informed hearing officer selection.

¶ 50 Furthermore, the Board did not rely solely on the requests to Flores of fill out the ABC forms to justify her dismissal, as there were multiple other bases indicated in the Board's decision. In fact, the hearing officer, as adopted by the Board, noted in a footnote that Flores' knowledge of the need to complete the forms, and her subsequent failure to do so, was not itself irremediable conduct, but part of a pattern by which Flores actively disregarded D.F.'s needs.

¶ 51 Additionally, we reject Flores' argument that the Board based its dismissal decision on an allegation that Flores asked to have D.F. arrested while in his presence despite this allegation not being included in the dismissal charges and specifications. Notably, Specification 3 alleged that, on March 16, 2016, Flores "used inappropriate language toward" D.F. "including, but not limited to yelling at him, 'Get out of the class!' " Furthermore, Specification 7 alleged that on March 16, 2016, "after yelling and screaming at [Dr. Williams] in the hallway, [Flores] violated a directive to go into the counseling suite to calm down, and said [she was] 'not leaving until the police arrived.' " Together, these specifications sufficiently apprised Flores that the Board might adduce information about her asking to have D.F. arrested in his presence, and the Board could rely on such evidence in making its ultimate decision to terminate Flores.

¶ 52 Although Flores relies on *Aulwurm*, 67 Ill. 2d 434, to support her argument that the Board acted improperly, we find that case inapposite. There, a tenured teacher was served with written

notice of the charges against him, which contained eight grounds justifying his dismissal. *Id.* at 436. The teacher sought, and received, a bill of particulars, which set forth the factual allegations underlying the grounds for dismissal, including that the teacher "failed to submit lesson plans, attendance forms, student recognition reports and failed to conduct a student musical in the spring of 1974" as well as failed "to perform adequately his duties as an assistant football coach." *Id.* However, at his dismissal hearing, the local school board adduced evidence over the teacher's objections that the teacher failed to amend course syllabi as directed and failed to perform adequately his duties as an assistant wrestling coach. *Id.* at 436-37. Following the hearing, the local school board dismissed the teacher. *Id.* at 435.

¶ 53 Eventually, the case reached our supreme court. The court initially noted that, because the local school board failed to notify the teacher of the allegations in connection with the course syllabi and his duties as an assistant wrestling coach prior to the hearing, the school board could not seek to base its dismissal of the teacher's employment on them. *Id.* at 437. Our supreme court ultimately decided the case on grounds unrelated to the school board's failure to notify the teacher of the additional allegations. *Id.* at 437-43.

¶ 54 In *Aulwurm*, the additional allegations first presented during the teacher's hearing involved matters unrelated to the allegations in the charging document. In contrast, in this case, Flores knew the critical components of the Specification 2—knowledge of the need to complete the ABC forms and recordkeeping—and knew from Specifications 3 and 7 that the Board might adduce information about Flores asking to have D.F. arrested in his presence. Consequently, the Board did not violate the School Code's notice requirement.

¶ 55 B. The Board's Findings

¶ 56 Flores next contends the Board's findings that Specifications 2, 4, 5 and 7 were proven were against the manifest weight of evidence. Flores does not challenge that, if these specifications were proven, they would have sustained the various charges against her, *i.e.*, the Corrective Action Categories, Board Resolution 04-0728-RS2, and the ISBE Rules and Regulations. Rather, she argues that the evidence failed to prove the specifications themselves.

¶ 57 In an administrative hearing, the hearing officer acts as the trier of fact and pursuant to that role, observes and listens to the witnesses, determines their credibility, assigns weight to their testimony and draws any reasonable inferences from the evidence. *Ahmad v. Board of Education of the City of Chicago*, 365 Ill. App. 3d 155, 162 (2006). As previously noted, following the hearing, the hearing officer must report her findings and a recommendation as to whether or not the teacher should be dismissed to the superintendant. 105 ILCS 5/34-85(a)(6) (West 2016). Afterward, the Board has 45 days to make its decision. 105 ILCS 5/34-85(a)(7) (West 2016). Thus, the hearing officer's findings are merely a recommendation to the Board. *Raitzik v. Board of Education of the City of Chicago*, 356 Ill. App. 3d 813, 823 (2005). Generally under such circumstances, we do not review the hearing officer's decision, but rather that of the Board. See *Beggs*, 2016 IL 120236, ¶ 61. However, when the Board merely approves and adopts the decision of the hearing officer in whole without supplementing the findings, as was the case here, "the Board's decision is a mere proxy for that of the hearing officer," meaning we are essentially reviewing the findings of the hearing officer for error. *Russell v. Board of Education of the City of Chicago*, 379 Ill. App. 3d 38, 46 (2007). Nevertheless, we will refer to the findings as if made by the Board in the first instance.

¶ 58 The applicable standard of review depends upon the question presented, and whether that question is one of law, one of fact, or a mixed question of law and fact. *Cinkus v. Village of*

Stickney Municipal Officers Electoral Board, 228 Ill. 2d 200, 210 (2008). Here, Flores asserts, without disagreement from the Board and the CEO, that the question presented about the propriety of the Board's findings concerning Specifications 2, 4, 5 and 7 are factual ones. And we agree. Findings of fact are considered *prima facie* true and correct, and we will only overrule them where they are against the manifest weight of the evidence. *Id.* A finding is against the manifest weight of the evidence only "when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Vancura v. Katris*, 238 Ill. 2d 352, 385-86 (2010).

¶ 59 1. Specification 2

¶ 60 Initially, we note that Flores' argument regarding Specification 2 is simply re-arguing her earlier contention that the Board improperly re-wrote this specification. Having found nothing improper about the Board's actions, we find that there was ample evidence presented at the hearing from Jacqueline Cuisinier, the counselor and case manager at Dett Elementary School, Dr. LaMonica Williams, the principal at Dett Elementary School, and the documentary evidence to support the Board's finding that Flores was instructed and requested to the complete the ABC forms. In particular, in an April 13, 2016, e-mail from Cuisinier to Dr. Williams, Cuisinier stated that, in their October 2015 meeting to discuss D.F.'s behavior, "Flores was given ABC charts or anecdotal record forms for her to fill out and collect data for [D.F.]" Based on this evidence and the other evidence presented at the hearing, we cannot say the Board's finding that Specification 2 was proved was arbitrary, unreasonable or not based on the evidence. Consequently, the Board's finding on Specification 2 was not against the manifest weight of the evidence.

¶ 61 2. Specifications 4 and 5

¶ 62 Flores next argues that the Board's finding that Flores grabbed and dragged D.F. into the hallway and flung him at Dr. Williams was against the manifest weight of the evidence.

¶ 63 Regarding these specifications, the Board's determination that they were proven was essentially based on the resolution of a credibility contest between Dr. Williams and Flores. Under Dr. Williams' version of events, as she exited the classroom next door to Flores', she observed Flores dragging D.F. by his arm out of their room. Then, according to Dr. Williams, Flores "flung" D.F. toward her. During Flores' testimony at the hearing, she denied this version of events and instead stated that D.F. ran into the hallway on his own after Flores instructed him to leave. In the Board's decision, it found Dr. Williams more credible than Flores as a whole, but particular to this incident, the Board determined that Flores' "account is less credible, particularly as to her own behavior." It is well-settled that, in administrative review, it is the responsibility of the administrative agency, here the Board, "to weigh the evidence, determine the credibility of the witnesses, and resolve conflicts in the testimony." *Matos v. Cook County Sheriff's Merit Board*, 401 Ill. App. 3d 536, 542 (2010). Nothing in our review of the record demonstrates that this credibility finding was improper. Therefore, based on Dr. Williams' credible testimony about Flores' grabbing and dragging D.F. into the hallway and then flinging him toward her, we cannot say the Board's findings that Specifications 4 and 5 were proved were arbitrary, unreasonable or not based on the evidence. Consequently, the Board's findings on Specifications 4 and 5 were not against the manifest weight of the evidence.

¶ 64 Nevertheless, Flores argues that, even if she did physically remove D.F. from her classroom, her conduct could not form the basis for her termination because she was complying with the mandates of section 34-84a of the School Code (105 ILCS 5/34-84a (West 2016)). Under that section, any teacher "providing a related service for or with respect to a student shall

maintain discipline in the schools," and a local school board may establish rules concerning discipline so long as those rules provide that a teacher "may use reasonable force as needed to maintain safety for the other students" as well as "remove a student from the classroom for disruptive behavior." *Id.* Flores argues that, under section 34-84a, she was required to maintain discipline in her classroom and was authorized to remove D.F. from her classroom for his disruptive behavior.

¶ 65 The Board and the CEO, however, argue that the reference in section 34-84a to a "related service" is a term of art germane to the area of special education. See, *e.g.*, 105 ILCS 5/14-6.01 (West 2016) ("Special education and related services must be provided in accordance with the student's [individualized education program] no later than 10 school attendance days after notice is provided to the parents."); 105 ILCS 5/14-8.02(b) (West 2016) ("Special education and related services must be provided in accordance with the student's [individualized education program] no later than 10 school attendance days after notice is provided to the parents."). And thus, according to the Board and the CEO, this section is inapplicable to Flores' conduct because on March 16, 2016, D.F. was not receiving special education services.

¶ 66 We note this court has referenced section 34-84a of the School Code (105 ILCS 5/34-84a (West 2016)) without regard to special education services. See *M.F. Booker v. Board of Education of City of Chicago*, 2016 IL App (1st) 151151, ¶¶ 81, 90 (finding where the hearing officer determined that the teacher caused psychological harm and physical harm to students, that conduct was irremediable *per se* despite the teacher's argument that, under section 34-84a, she was entitled to use reasonable force as needed to maintain safety in the classroom and remove a student for disruptive behavior). And notably, the Board and the CEO do not cite to a single case supporting their argument.

¶ 67 However, we need not determine whether section 34-84a applies because Flores never raised this theory during the hearing. "It is quite established that if an argument, issue, or defense is not presented in an administrative hearing, it is procedurally defaulted and may not be raised for the first time *** on administrative review." *Cinkus*, 228 Ill. 2d at 212. As noted by the Board in its written decision, at the hearing, Flores denied that she physically removed D.F. from the classroom, instead testifying that he ran out of the room and into the hallway. As further noted by the Board in its decision, Flores argued that the allegation of her grabbing and dragging D.F. out of the classroom was not proved by credible evidence given that no report was filed with the Illinois Department of Children and Family Services and there was no evidence that D.F. suffered any bruises or marks. By proceeding at the hearing with a denial of the allegations, Flores deprived the hearing officer, and in turn the Board, an opportunity to make findings on whether her use of force to maintain discipline in the classroom was reasonable. Because of this failure, Flores' argument about section 34-84a of the School Code (105 ILCS 5/34-84a (West 2016)) has been forfeited. See *Cinkus*, 228 Ill. 2d 212.

¶ 68 3. Specification 7

¶ 69 Flores next argues that the Board's finding that Flores violated a directive to go to the counselor's office was against the manifest weight of the evidence.

¶ 70 Regarding this specification, while it is undisputed that Flores eventually went to the counselor's office, Dr. Williams testified that Flores did not go the office immediately despite a directive. While Flores acknowledged not going right away, she testified that she proceeded in this manner because she wanted to make sure there was another adult supervising her students before leaving. While Flores' conduct may seem laudable in that she did not want to leave her students unsupervised, based on the credible evidence from Dr. Williams, Flores' yelling and

screaming in the hallway was disrupting the entire first floor of Dett Elementary School. The directive by Dr. Williams was intended for Flores to go to the counselor's office and calm down so as not to disrupt the learning of the other students and, we can presume, to prevent her own students from seeing her continued outburst. Based on Dr. Williams' testimony, we cannot say the Board's finding that Specification 7 was proved was arbitrary, unreasonable or not based on the evidence. Consequently, the Board's finding on Specification 7 was not against the manifest weight of the evidence.

¶ 71 4. Demonizing Conduct by Flores

¶ 72 Flores next argues that the Board's finding that the e-mails she drafted and sent to Dr. Williams about D.F. were demonizing, and therefore cruel and unprofessional, was against the manifest weight of the evidence.

¶ 73 In its written decision, the Board found that, "[u]nder the facts of this case, it appears that Flores's refusal to cooperate with the process of gathering data to allow CPS staff to properly evaluate D.F. to ensure he received the services he might need, her disregard for the guidance she had been given as to how to handle D.F., and instead her drafting emails that demonized D.F.'s behavior, was unprofessional and cruel." Based on our review of Flores' e-mails to Dr. Williams, we would not consider the information provided by Flores to have "demonized D.F.'s behavior." These e-mails merely described what D.F. had done to her, her students and other staff members. But the Board's ultimate finding that Flores' conduct was cruel and unprofessional was not solely based on the content of Flores' e-mails or the Board's characterization of them as having "demonized D.F.'s behavior." Rather, the Board's statement was made within the broader context of Flores' failure to participate in the necessary data-collection process to allow D.F. to be better evaluated for his behavioral issues, which in turn,

would allow for more tailored services for D.F. to help with these issues. It is the cumulative nature of Flores' omissions that rendered her conduct cruel and unprofessional, not the fact that the Board characterized the e-mails as having "demonized D.F.'s behavior." While perhaps the Board should have selected a better word than "demonized," its characterization of them as such did not affect its ultimate conclusion that Flores' conduct was unprofessional and cruel. Thus, even if we were to find the Board's characterization of Flores' e-mails to be against the manifest weight of the evidence, the mischaracterization would not have prejudiced Flores. See *M.F. Booker*, 2016 IL App (1st) 151151, ¶ 70 (errors that occur in administrative proceedings may be deemed non-prejudicial).

¶ 74 C. Irremediable Conduct

¶ 75 Flores lastly contends that the Board failed to demonstrate that she engaged in any conduct that could be considered irremediable and thus, the Board was without authority to terminate her employment absent a prior written warning.

¶ 76 As previously discussed, if a teacher's conduct is deemed remediable rather than irremediable, the teacher cannot be terminated for such conduct without written warning. 105 ILCS 5/34-85(a) (West 2016). And, in fact, the Board has no authority to terminate the teacher's employment. *Jackson*, 2016 IL App (1st) 141388, ¶ 30. Historically, to determine whether a teacher's conduct was irremediable, courts employed the two-part test of *Gilliland*, 67 Ill. 2d 143. Under this test, a teacher's conduct will be deemed irremediable if (1) damage was done to students, the faculty, or the school, and (2) the conduct could not have been corrected had superiors warned the teacher. *Id.* at 153.

¶ 77 However, in 1995, the School Code was amended to make certain types of conduct irremediable *per se*. Pub. Act 89-15 (eff. May 30, 1995) (amending 105 ILCS 5/34-85(a)); see

M.F. Booker, 2016 IL App (1st) 151151, ¶ 86. Under the amended section 34-85(a) of the School Code (105 ILCS 5/34-85(a) (West 2016)), conduct that is "cruel, immoral, negligent, or criminal or that in any way causes psychological or physical harm or injury to a student" is deemed irremediable, and the teacher is not entitled to any written warning prior to the charges being brought. See *Younge*, 338 Ill. App. 3d at 534. In light of the amendment to the School Code, there are two ways for conduct to be deemed irremediable—*per se* by statute or under *Gilliland*—and a showing on either one is sufficient cause for termination without warning. See *id.* at 533-34. Whether conduct is irremediable is a question of fact for the trier of fact, and we may not reverse the Board's finding on that question unless it was against the manifest weight of the evidence. *M.F. Booker*, 2016 IL App (1st) 151151, ¶ 84.

¶ 78 In this case, the Board first analyzed whether Flores' conduct was irremediable *per se* and initially focused on her disregard of the data-collection process, in particular the ABC forms, and her failure to follow the safety plan. The Board readily acknowledged the difficulty of teaching D.F., a troubled child with serious behavioral issues. But the Board aptly noted that improvement in D.F.'s behavior could only occur if the people around him at school fulfilled their obligations. In particular, for Flores, that was collecting anecdotal data of D.F.'s behavior through the ABC forms and strict adherence to a safety plan when D.F. began to show signs of agitation. After considering the evidence at the hearing, the Board determined that Flores abdicated her responsibility to D.F. by not collecting the required data or adhering to the safety plan. It is undisputable how critical it was for Flores to implement the safety plan when required and how essential the data-collection process was to D.F., in particular to the development of more tailored services to him and possibly the creation of an individualized education program. Though Flores sent e-mails to Dr. Williams describing D.F.'s behavior, those were not sufficient

for Dr. Barker's purposes and while they were for Cuisinier, she also admitted she had to personally observe D.F. in class to supplement the missing records from Flores. Whereas Flores' e-mails contained generic descriptions of D.F.'s misbehavior, the ABC forms required much more detail of his misbehavior, including what may have triggered the behavior and what occurred as a result of the behavior. Given how vital the data-collection process and safety plan were for D.F.'s development, the Board's finding that Flores' failure to adhere to them demonstrated "persistent neglect" of, and thus cruelness toward D.F. was not arbitrary, unreasonable or not based on the evidence. As noted by the Board in its findings, when Flores was not D.F.'s teacher, his behavior showed marked improvement, and D.F. had not been removed from a classroom since the March 16, 2016, incident, according to Dr. Williams. Under the circumstances, the Board's finding that Flores conduct was irremediable *per se* was not against the manifest weight of the evidence.

¶ 79 The Board also analyzed whether Flores' conduct on March 16, 2016, was irremediable *per se*. As observed by the Board, the evidence showed that D.F. was upset coming back to Flores' classroom in the afternoon shortly before throwing the scissors at her. According to the Board, at that point, Flores should have implemented the safety plan to help D.F. deescalate, but she did not, which the Board found negligent. Instead, after D.F. threw the scissors at her, Flores grabbed him, dragged him into the hallway, threw him toward Dr. Williams and yelled about him in his presence. The Board acknowledged that D.F.'s behavior warranted an immediate reaction from Flores to protect herself and the other students, but the Board found that D.F.'s behavior did not justify her subsequent physical actions. Based on this, the Board deemed Flores' conduct negligent and cruel.

¶ 80 With regard to the Board's negligent finding for failing to implement the safety plan on March 16, 2016, it was not arbitrary, unreasonable or not based on the evidence. Clearly, the evidence, including Flores' own testimony, showed D.F. was beginning to show signs of agitation while coming back into the classroom and at that point, she should have implemented the safety plan for the protection of D.F., herself and the other students. As such, the Board's finding of negligence for Flores' failure to implement the safety plan, and thus her conduct being irremediable *per se*, was not against the manifest weight of the evidence. Additionally, while we have a certain amount of sympathy for Flores based on her history with D.F. and having scissors thrown at her, as the Board observed, nothing justified her physical handling of a six-year-old. See *M.F. Booker*, 2016 IL App (1st) 151151, ¶ 82 ("Corporal punishment is an irremediable cause for dismissal."). Because of this, the Board's finding of negligence and cruelty based on Flores' physical handling of D.F. was not arbitrary, unreasonable or not based on the evidence. Thus, the Board's finding that her conduct was irremediable *per se* was not against the manifest weight of the evidence.

¶ 81 Because the Board properly deemed Flores' conduct to be irremediable *per se*, we need not determine whether her conduct was irremediable under *Gilliland*. See *Younge*, 338 Ill. App. 3d at 534. Accordingly, the Board had the authority to terminate Flores' employment. See *Jackson*, 2016 IL App (1st) 141388, ¶ 30.

¶ 82 III. CONCLUSION

¶ 83 For the foregoing reasons, we confirm the order of the Board of Education of the City of Chicago.

¶ 84 Confirmed.