

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA

In the Matter of the Immediate Suspension
and Dismissal of:

LEONARD ISENBERG (EN 583396), a
permanent certificated employee,

Respondent.

OAH No. 2010120065

DECISION

This matter was heard by the Commission on Professional Competence (Commission) in Los Angeles, California, on March 4, May 8-10, May 28-31, July 17-19, and July 25-26, 2013. The Commission consists of Teresa Velasco, Los Angeles County Office of Education (retired); Teresa Brown, Torrance Unified School District; and Administrative Law Judge Eric Sawyer, Office of Administrative Hearings (OAH), State of California, who presided.

Michele M. Goldsmith, Esq., Bergman Dacey Goldsmith, represented Complainant Los Angeles Unified School District (District).

Ronald C. Lapekas, Esq., represented Leonard Isenberg (Respondent), who was present on each day of hearing.

The record was closed and the case deemed submitted for decision at the conclusion of the hearing on July 26, 2013. The Commission thereafter deliberated in executive session.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Board of Education (Board) is the duly elected, qualified and acting governing board of the District, organized, existing and operating pursuant to the provisions of the California Education Code and other laws of the State of California.
2. At all times relevant Respondent was a permanent certificated employee of the District.
3. On or about October 26, 2010, Vivian K. Ekhian, in her official capacity as the District's Chief Human Resources Officer, filed with the Board a Statement of Charges against Respondent, alleging factual and legal grounds for Respondent's immediate suspension without pay and termination of his employment with the District.

4. By a letter dated November 10, 2010, Respondent was advised by Ms. Ekhchian that the Statement of Charges had been filed with the Board, and that during a closed session of a Board meeting held on November 9, 2010, the Board decided to dismiss Respondent within 30 days, unless he demanded a hearing. Respondent was also advised that he had been suspended without pay, effective immediately. Respondent requested a hearing.

5. On or about December 7, 2010, the District filed an Accusation and Statement of Charges with OAH and served the same on Respondent. Respondent timely filed a Notice of Defense, which contained a request for the hearing that ensued. Respondent was timely provided with notice of the hearing before the Commission. The parties subsequently executed a written stipulation waiving the statutory requirement that the hearing be held within 60 days from Respondent's request for a hearing.

6. On or after August 18, 2011, Respondent filed a "First Amended Notice of Defense," which asserted a number of affirmative defenses, including that the District's adverse actions against him were in retaliation for his whistleblowing and exercising his constitutional right to communicate about District affairs with a newspaper reporter.

Respondent's Background Information

7. Respondent presently holds a clear single subject teaching credential in Social Studies, which authorizes him to teach social studies in grades twelve and below, including preschool, and in classes organized primarily for adults; as well as a clear crosscultural, language and academic development (CLAD) certificate, which, when held in conjunction with a prerequisite credential or permit specified in the Education Code, authorizes Respondent to provide specified services to limited-English-proficient pupils.

8. Respondent began his career with the District in 1987 as a substitute and long-term substitute teacher. He left the District in 1989 to pursue other teaching opportunities and career interests. He returned to the District in 1996 and has remained there through the present.

9. Pertinent to the charges in the Accusation, Respondent was assigned to the Central High School (CHS) in May of 2005. CHS is an option school, featuring alternative and non-traditional high school classes for students behind in their credits, at-risk for dropping out of school, or who have been expelled from their prior high schools. CHS has 28 campuses throughout the City of Los Angeles. In July 2007, Respondent was assigned to a newly opened campus of CHS known as Miracle Mile. Because student enrollment at Miracle Mile remained perpetually low, half of the campus was closed in June 2009, and Respondent was reassigned to teach social studies at three different campuses within CHS: Highland Park for two days a week, East Los Angeles Occupational Center (ELAOC) for two days a week, and the United American Indian Involvement one day a week. In October 2009, Respondent worked exclusively at ELAOC after administrators became concerned over possible threats against him by students at the Highland Park site. Respondent had a number of Hispanic students in his classes.

The Events of 2009

10. In July 2009, over the course of several days, Respondent, while teaching at CHS, directed the following remarks toward students during class time:

- A. "You are losers;"
- B. "You are nothing;"
- C. "You will be nothing to our society;"
- D. "You will be low paying job seekers;" and
- E. "The reason you Mexicans get in trouble is because you don't know the law. I know the law. You should be like me."

It was unnecessary for Respondent to mention race or ethnicity in teaching the topics in question, or to make negative comments like that to his students. Respondent's class was comprised of high-risk students; it would have been enough to simply mention that fact. Respondent was new to his class and did not know his students well. While it is probably never appropriate to make the above-described comments in class, Respondent most certainly should not have made them when he did not fully understand or know his audience, or vice versa. Many of the students found the comments disparaging and hurtful, which undercut their trust in and respect for Respondent, and impeded his ability to teach them.

11. In July 2009, Respondent discussed students' reading levels, confidential information about their families and their parents' immigration status during class-time with other students present. As mentioned above, Respondent did not understand his audience or the detrimental impact those comments would have on this class. Respondent may have made the comments in order to trigger class discussion, but pointing out that information in front of other students was improper. Those comments hurt some students' feelings and undermined Respondent's authority to teach. Respondent was not sensitive to how those comments could affect his students.

12. In July 2009, Respondent told students, "It's a good thing we educate Mexicans so we can have someone to do manual labor," or words to that effect. Respondent did not mean to disparage his students. He meant the comment to be provocative or ironic. However, as was the situation described above, by mentioning race and ethnicity to make his point, Respondent ultimately upset and offended many of his students. Moreover, in making that comment, Respondent did not add any other context or information to allow the students to compare the situation or make sense of what he was saying. Thus, this ended up not being a valid or productive teaching moment.

13. On or about August 10, 2009, Respondent discussed, during instructional time, written statements that some students had submitted to CHS Assistant Principal Rene Martinez. Those written statements previously had been obtained by Mr. Martinez in response to complaints made to Respondent's supervisors about some or all of Respondent's aforementioned comments in class. In response, Respondent told students that other teachers and administrators were "out to get me fired." He therefore told students to write good things

about him and requested some students to re-write statements and submit them to Mr. Martinez. Respondent over-stepped his authority with his students in doing this. Although Respondent felt attacked by his supervisors at this time, it did not give him license to involve his students in his own personnel matters. The students knew that Respondent had power over them, in terms of grades or their graduating. Respondent improperly used his influence on students to essentially force them to do something they were uncomfortable doing. Given that undue influence, there was no assurance that the information provided by the students would be accurate or valuable; the students may have written favorable information simply to gain favor with Respondent. Thus, this project was flawed from the beginning.

14. On or about September 23, 2009, Respondent decided to remove Jesse from his classroom because Jesse was misbehaving. Respondent had the right under the Education Code to temporarily remove a student from his classroom without seeking permission from administrators. The CHS campus where he was teaching at the time was small and there was no other place to put Jesse, without disrupting the classroom of another teacher. So removing Jesse from his classroom was ultimately the same as excusing Jesse from school. This problem was created by the District. In this sense, it was not established that Respondent tried to formally suspend Jesse from school without administrative authorization. However, the problem was that Respondent did not contact Jesse's home or otherwise make sure he would be safe after leaving Respondent's classroom, and therefore the campus. That was not proper.

15. On November 2, 2009, Respondent met with CHS Principal Janet Seary and Assistant Principal Martinez in a small office to discuss the events described above. It was a counseling conference. Respondent had a colleague with him to take notes. It was not established that during the meeting Respondent asked Mr. Martinez, "You have anything to say?" or that he angrily called him a "pendejo idiota." Mr. Martinez testified that even though he was not fluent in Spanish, he knew what that phrase meant. If he in fact heard Respondent make that comment, it is curious why he, as an administrator, would not have immediately stopped the discussion and asked Respondent to clarify what he meant or confirm what he said. Mr. Martinez did not do that. He said nothing, and waited until after the meeting to mention this to Principal Seary. In addition, Respondent's colleague credibly testified that he heard no such comment, even though they were all seated very close to each other in a small room.

16. On November 3, 2009, Respondent, during a faculty meeting, ignored Principal Seary's request to wait until after the faculty meeting to obtain signatures on a petition and continued circulating said petition to teachers. At meetings such as this, teachers commonly pass out items. However, once Principal Seary told Respondent to refrain from circulating his petition, he should have stopped. Instead, Respondent continued. By this time, Respondent had no respect for Principal Seary, and he showed his lack of respect for her by ignoring her request. Respondent's testimony that he did not continue to circulate the petition was not credible, and was refuted by the credible testimony of several other teachers present at the meeting.

17. During that same faculty meeting on November 3, 2009, Respondent answered Principal Seary's question as to why he was continuing to circulate the petition during the faculty meeting by stating, "Come on Janet, I don't have to listen to you. Go ahead and write me up." Respondent's antics during faculty meetings bothered some fellow teachers, annoyed others, and had no impact on the rest.

The Events of Early 2010

18. On January 28, 2010, Respondent confronted Principal Seary about an issue pertaining to Respondent's private website while in her office area, in front of staff. Principal Seary told him that the discussion should not be in the presence of others, but Respondent continued, in a rude and confrontational manner.

19. On February 2, 2010, in spite of being told by Principal Seary that it was inappropriate to discuss his personal website at a faculty meeting that was being held at that time, Respondent disrupted the meeting by continuing to do so. Some of the teachers present were annoyed by Respondent's antics.

20. On February 3, 2010, at a time when Respondent was being observed by Assistant Principal Martinez, Respondent stopped teaching and instead began to confront Mr. Martinez about a student who was misbehaving. Respondent demanded that the matter be handled immediately. In spite of Mr. Martinez's directive to continue with the lesson, Respondent refused.

21. On February 3, 2010, Respondent began to mock and provoke Assistant Principal Martinez in the presence of students. Respondent did so by using the same tone and words used by Mr. Martinez when communicating with him. In addition, Respondent began to mockingly use Mr. Martinez's name in the sentences that were being presented as part of the lesson.

The Events of February 4, 2010

22. On February 4, 2010, Respondent downloaded a page from his personal website which described the incident Respondent had with Assistant Principal Martinez on the previous day, and he circulated this page among the students in his classroom. Respondent asked students to read the material and write comments about it. This material was not part of the prescribed curriculum, and it is not clear that Respondent was using this material to teach a lesson or tie-in to a particular part of the curriculum. Instead, Respondent was trying to circumvent previous directives by his supervisors to not involve his students in his personnel matters. It was not established that Respondent told his students that, unless they participated in the exercise, they would receive a fail and he would contact their parents. In fact, many of the students simply refused to do the assignment. However, Respondent's goal was to obtain a few favorable statements from students he liked or whom he believed liked him, in order to secure evidence for his use in the now festering personnel actions in which he was embroiled.

23. Principal Seary was advised of these events later that morning. This was the last straw for her. She decided to pull Respondent from his classroom. Her decision was approved by her supervisor, Administrative Coordinator Janice Davis. Principal Seary went to Respondent's classroom to serve him with the written pull notice. Upon her arrival, Principal Seary directed Respondent to stop soliciting student statements about the page downloaded from his website. Respondent refused to comply. Principal Seary collected the materials Respondent gave the students and whatever statements they wrote.

24. Respondent, after being directed by Principal Seary not to involve his students in the incident between him and Assistant Principal Martinez from the previous day, undermined the authority of the principal by indicating to the students (by winking to them as he spoke) not to follow Principal Seary's directive.

25. After Principal Seary served Respondent with the written pull notice removing him from the classroom, she asked Respondent to give her the District-issued computer that was in the classroom, an HP laptop. Respondent unreasonably refused to comply with Principal Seary's directive to turn in the District's computer.

26. Principal Seary had asked a District police officer to join her when she decided to serve the pull notice on Respondent. After Respondent refused to return the HP computer present in the classroom, Principal Seary enlisted the aid of the police officer. Respondent got into an argument with the police officer and did not cooperate with him. In the process, Respondent was rude, disrespectful and belligerent to the police officer, in the presence of his students. Fearing for his safety, and in order to maintain the peace, the police officer handcuffed Respondent and advised him that he would be arrested if he continued to refuse to return District property. The police officer also called for back-up because the situation was becoming precarious given Respondent's irrational behavior. It was only upon the coaxing of the officer that Respondent relinquished the District-issued HP computer. Much of this happened in front of Respondent's students

27. After Respondent was directed to report to the Local District 6 Office, he began to yell at Principal Seary, and said words to the effect of, "You are a liar!," "You said you wanted war!," and "I am not afraid of being arrested!" These comments were made in front of the two police officers.

Material Found on Respondent's Computer & His Blogging Activity

28. Due to Respondent's bizarre response to the directive that he return the District-issued HP computer, Janice Davis became suspicious that there was something on that computer Respondent was hiding. Ms. Davis instructed Principal Seary to make sure that Respondent returned the other District computer issued to Respondent, a Macbook; and that both computers be searched for inappropriate content. The HP computer was searched by forensic computer experts and no inappropriate content was found.

29. However, a forensic search of Respondent's Macbook computer revealed that he had used it to download and access inappropriate and pornographic material in violation of the District's Acceptable Use Policy. The Macbook computer was issued new to Respondent. No other teacher had access to it. Respondent admitted that he took the computer home with him fairly soon after he received it and it remained there until he was relieved of his duties. No evidence suggests the computer was left unattended in his classroom or was otherwise accessed by students or other faculty. Thus, Respondent was the only person who had access to the computer. Respondent provided no explanation for how the material got on his computer. Moreover, some of the material was accessed proximate to when the District's website had been accessed, indicating the person using the computer at Respondent's home when accessing the material knew how to get into the District's internal computer system. Under these circumstances, Respondent's testimony was unpersuasive that he had no idea how that material got on the computer.

30. It was not established that Respondent engaged in personal real estate business with the use of a District-issued computer during work hours.

31. Respondent engaged in work pertaining to his personal website during work hours.

32. On January 11, 2010, Respondent posted on his website school documents containing students' classroom locations, names of their teachers, and student test scores without the appropriate authorization, in violation of District policy.

33. On January 11, 2010, Respondent videotaped and posted on his website an interview with a former CHS student, Javier, who at the time of the interview was a minor. The contents of the interview were not established, so it was not established whether the interview divulged confidential pupil records that would have required Respondent to provide the District with the required parental consent form.

34. On July 29, 2009, Respondent was directed never to discuss student confidential information, including reading levels, family relationships or status in a manner that breaches confidentiality. Respondent thereafter violated that directive. For example, Respondent disclosed student personal information, particularly their identities and test scores, to Los Angeles Times reporter Mitchell Landsberg. On several other occasions, Respondent included Mr. Landsberg as a "blind cc" on many of his e-mails to Principal Seary which contained such confidential information. Principal Seary was initially unaware that Mr. Landsberg was receiving that information. At one point, Respondent provided Mr. Landsberg with a password that allowed him unfettered access through a computer to confidential student information. It was not established whether Mr. Landsberg accessed that information. However, Respondent testified that he knew at the time that providing that confidential information to Mr. Landsberg was in violation of District policy, but he felt he had the right to do it because he was complaining about District activities he felt were improper or illegal.

35. As the above-described events were unfolding, Respondent was issued counseling memoranda; a Notice of Unsatisfactory Acts dated November 2, 2009; a Notice of Unsatisfactory Acts dated December 14, 2009; a Below Standard Stull Evaluation dated May 11, 2010; and two Notices of Unsatisfactory Acts dated June 3, 2010. Principal Seary and the District used progressive discipline in responding to Respondent's conduct described above. Despite this counseling, Respondent failed to attain and sustain an acceptable level of conduct. In fact, Respondent believed he was being attacked and he completely disregarded the counseling he was offered. Instead, he became more enraged over time, less cooperative, and more disruptive. His misbehavior and misconduct simply escalated.

Findings Related to Respondent's Affirmative Defenses of Retaliation

36. Not long after Respondent returned to service with the District in 1996, he was assigned to a school in Pacific Palisades which was, or was in the process of becoming, a charter school. He was there several years. Respondent testified that he left that assignment at his request. Thereafter, Respondent worked at a regular school in West Los Angeles, and then another charter school. In his deposition, Respondent testified that he requested a transfer to the second charter school. Given Respondent's temperament and teaching style, working at a charter school was probably a more comfortable environment for him.

37. Respondent transferred to CHS in 2005. He essentially taught at a different campus each school year through 2007.

38. In July 2007, Respondent requested Principal Seary for a letter of recommendation. Principal Seary obliged, and she wrote a one-page letter, concluding, "Mr. Isenberg is an extremely capable and professional educator. I highly recommend him and would be happy to answer any questions regarding him."

39. Principal Seary received a complaint about Respondent sometime in 2007 for yelling at a student. She informally counseled him. In connection with a classroom observation of Respondent in 2007, Principal Seary counseled him on student classroom behavior. During the 2008-2009 school year, Principal Seary counseled Respondent after she received a complaint from a parent that he was rude to her during a parent-teacher meeting. During the same time frame, CHS Assistant Principal Janine Antoine became involved in mediating a dispute between Respondent and another teacher, Gary Larkin. Some students told Principal Seary they preferred being assigned to Mr. Larkin over Respondent. Around this time, Respondent also became involved in a dust-up with Ms. Antoine when he failed to follow her directive to not fail students. The District had, and still has, a policy of not giving failing marks to students as their final grade.

///

///

40. Respondent received no formal discipline from the District before July 2009, and no evidence was presented of any written counseling from November 2006 through July 2009. However, as discussed above, Respondent had received some informal counseling and guidance in response to behaviors that would echo more prominently in and after July 2009, such as inappropriate comments to students and a parent, activity which annoyed fellow teachers, and a willingness to ignore or refuse supervisor directives. Therefore, Respondent's career with the District was not as uneventful as he indicates before July 2009.

41. Not long after Respondent transferred to the Miracle Mile campus in September 2007, he advised Principal Seary that he thought the District was paying above market rental rate for the property. In April 2008, Respondent contacted Mr. Landsberg of the Times, and advised him of the same opinion. Respondent also advised Mr. Landsberg that the District was using an improper and expensive telephone/computer line, had too many teachers for too few students, and essentially that the District was wasting money in its operation of the Miracle Mile campus. Throughout 2008 and 2009, Respondent reiterated these concerns to high-ranking District administrators, including an official in the Superintendent's office. Respondent also testified that he reported his concerns about financial waste to the District Office of the Inspector General (OIG), but he could not remember when.

42. Respondent also became concerned that the District was engaging in social promotion, i.e., it was graduating students who were reading and writing at elementary grade levels. Respondent derived this concern mostly from the performance of graduating students on the District's STAR test. The data Respondent reviewed showed many graduating students had performed poorly on the STAR test, with scores at elementary grade levels. However, the STAR test was not one that students took seriously. Many students gave little or no effort in taking the test, and the results were therefore not an accurate gauge of their ability. In making graduation determinations, the District instead relied on the results of the CAHSEE test, which was a high-stakes test. Because students could not graduate unless they passed the CAHSEE test, students tried hard on the test and the results were therefore an accurate gauge of their potential and performance.

43. Before July 2009, Respondent shared his social promotion concerns with Principal Seary, Assistant Principals Antoine and Martinez, and several high-ranking District officials. Beginning in late June 2009, Respondent contacted Mr. Landsberg of the Times and shared the same concern with him on several occasions. It was during those contacts that Respondent improperly shared confidential student information with Mr. Landsberg in violation of District policy. In August 2009, Respondent filed a written complaint with OIG about his social promotion concern. After Respondent engaged in his misconduct from July through November 2009 described above, and received counseling and discipline from Principal Seary, Respondent submitted a written whistleblower complaint with OIG, alleging that those steps were taken against him by the District in retaliation for his whistleblowing.

44. Although we do not doubt the sincerity of Respondent's concerns or that he lodged the aforementioned complaints in the good faith belief they were true, we find that, in large part, Respondent was naïve and immature in coming to his conclusions. For example, the District established that the teacher staffing at Miracle Mile was necessary because the District could not have foreseen the exact number of students who would enroll at the new school site, and there had to be a special education teacher at the site in case any enrollees needed those services. In terms of the lease rate paid by the District, Respondent failed to account for the other benefits the District received from the landlord, such as parking, maintenance and other services not made available to the prior tenant. Respondent failed to establish that the telephone/computer line used by the District was improper or excessively costly. In terms of Respondent's social promotion concerns, Respondent should have known as a teacher with many years experience that the STAR test was not an accurate reflection of students' abilities, and yet there is no evidence indicating that he undertook any effort to correlate the same students' performance on the CAHSEE. Thus, neither of his complaints had merit. The fact that neither Mr. Landsberg nor the OIG took any affirmative action in response to them is not surprising.¹

45. It was not established that the District took any particular personnel action against Respondent because he made his complaints about financial impropriety concerning the Miracle Mile campus. The amount of money involved was microscopic compared to the staggering annual budget of the District. In this respect, Respondent's complaint can be viewed as a gnat to the District's elephant.

46. It was not established that the District took any action against Respondent because of his complaints of social promotion. We are well aware of the District's low overall graduation rate compared to other school districts in this state. The District is well known for that problem. Moreover, there is no prestige connected to graduation rates for continuing schools. The District administrators who learned the gist of Respondent's complaint knew the difference between the STAR and CAHSEE tests, and they quickly knew Respondent was wrong. Under these circumstances, Respondent's complaints were not serious enough to be taken seriously by Respondent's supervisors or high-ranking District administrators, and certainly not of merit or substance to cause those employees to retaliate against Respondent.

¹ By this we do not intend to convey an endorsement for the way in which the OIG operated. Although Respondent's complaints were not meritorious, they were not seriously investigated either. At one point, the OIG referred aspects of Respondent's social promotion complaint to his direct supervisors for investigation, which undermined the independence and neutrality of the investigation, and was unfair to Respondent. We agree with many of Respondent's complaints about that process utilized by the OIG in investigating his complaint.

47. Teaching in an alternate school like CHS was probably not a good fit for Respondent's temperament and teaching style. He obviously had a cultural clash with certain types of students and their parents; he was not patient with the students or respectful of their situations; and he was insensitive to how some of his comments in class could be hurtful. At first, he moved around schools and did not spend much time at one particular campus. However, he spent just enough time at those campuses to trigger the need for the informal counseling outlined above in Factual Findings 39-40. After the threat had been made against him at Highland Park which required his transfer, Respondent worked solely at ELAOC. He obviously did not get along with the students, and his conduct upset students and parents, which led to complaints. Principal Seary had to respond to the complaints, which increased the focus on Respondent's conduct. At this point, the glare from Respondent's temperamental defects and teaching deficiencies became more intense and attracted the further attention of his supervisors. Respondent thereafter refused to heed to Principal Seary's counseling and directives, and at some point Respondent simply decided to "declare war" against Principal Seary and the District. He became belligerent, insubordinate and intransigent.

LEGAL CONCLUSIONS

Burden and Standard of Proof on the Accusation

1. With regard to the Accusation, the District has the burden of proof in this matter, and the standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.) Preponderance of the evidence means that "the evidence on [the District's] side outweighs, preponderates over, is more than, the evidence on the other side." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325.)

Cause for Immediate Suspension and/or Termination

2. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in sections 44932, subdivision (a), and 44939, are established. In addition, a governing board may immediately suspend a certificated employee without pay pursuant to section 44939 upon the filing of a statement of charges alleging immoral conduct and/or willful refusal to perform regular assignments without reasonable cause.

3A. It was established by a preponderance of the evidence that Respondent engaged in immoral conduct within the meaning of Education Code sections 44932, subdivision (a)(1), and 44939.²

² All further statutory references are to the Education Code unless noted otherwise.

3B. The term "immoral conduct" has been defined to include conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

3C. In this case, Respondent accessed and downloaded pornographic material on his District-issued Macbook computer in violation of District policy. His use of District property for such purposes was shameless conduct showing complete moral indifference to the opinions of respectable members of the community. Respondent also made disparaging comments about students in their presence, some of which were ethnic in nature and hurtful to them. Respondent also published personal information about students' test scores and made public comments that those students were not worthy of having graduated from the District, even though they were. Respondent's conduct regarding the involved students was willful, flagrant and a shameless showing of moral indifference to their feelings, as well as a demonstration of an inconsiderate attitude toward those students in particular and the public welfare in general, at the sake of promoting his own agenda. (Factual Findings 10-12, 29, 32 and 34.)

4A. It was established by a preponderance of the evidence that Respondent engaged in unsatisfactory performance within the meaning of section 44932, subdivision (a)(4).

4B. The term "unsatisfactory performance" is not specifically defined in the Education Code or case law. Inasmuch as there is separate cause for dismissal for unprofessional conduct in subdivision (a) of section 44932, and we are not to presume the Legislature intended to enact completely duplicative statutes (*In re Maes* (2010) 185 Cal.App.4th 1094, 1110), unsatisfactory performance must mean something different from unprofessional conduct. In fact, section 44938, subdivision (c), specifies that "unsatisfactory performance" does not include any other cause for dismissal specified in section 44932.

4C. While unprofessional conduct can be determined by analyzing a teacher's conduct relative to the broader educational community, unsatisfactory performance must be analyzed with an eye toward the teacher's performance as evaluated by his or her employing school district. Section 44938 supports this proposition. Section 44938 requires a charge of unsatisfactory performance to be preceded by a written notice of unsatisfactory performance, and refers to section 44660 et seq., which in turn establish guidelines for how school districts should evaluate and assess the performance of their certificated employees. Thus, cause for discipline may be established if a certificated employee performs unsatisfactorily to his employing school district.

4D. However, it has been observed that the purpose of the statute giving tenure to teachers is to insure an efficient permanent staff of teachers whose members are not dependent on caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well. (*Bakersfield Elementary Teachers Ass'n v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1293, fn 20, citing 56 Cal.Jur.3d (2003) Schools, § 411, p. 757.) Therefore, an employing school district cannot be arbitrary or capricious in making decisions regarding whether a certificated employee has performed unsatisfactorily.

4E. In this case, it was established that Respondent engaged in unsatisfactory performance within the meaning of section 44932, subdivision (a)(4). His improper statements to and about students in the classroom was an unsatisfactory way of teaching District curriculum. (Factual Findings 10-12.) During an observation of his classroom teaching by Assistant Principal Martinez, Respondent abandoned teaching the District curriculum to engage in a confrontation with Mr. Martinez. (Factual Findings 20-22.) On two occasions, Respondent subjected his students to his own personnel conflicts with the District by asking them to do an assignment unrelated to District curriculum. (Factual Findings 13 and 22.) Finally, Respondent ignored his students and engaged in work pertaining to his own personal website while in the classroom during work hours. (Factual Finding 31.)

5A. It was established by a preponderance of the evidence that Respondent is evidently unfit for service as a teacher, pursuant to section 44932, subdivision (a)(5).

5B. "Evident unfitness for service" means clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) "'Evident unfitness for service' connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Id.*)

5C. In this case, Respondent made inappropriate comments to and about students, and was insensitive to how his comments were hurtful and would have denigrated the students' self-esteem. He was directed to not engage in certain conduct by his supervisors and yet he continually ignored their directives and continued to engage in the same conduct. Respondent demonstrated he was unwilling to, and incapable of, listening to counseling from his supervisors. In some instances, Respondent's behavior was so out-of-proportion to the underlying events as to demonstrate that he has an anger management problem. Respondent did not show flexibility in dealing with the students in his unique classroom assignment. He basically insisted that students "do it my way." These events demonstrate that Respondent has a temperamental defect that prevents him from being able to effectively teach. (Factual Findings 10-13, 16-27, 29, 31-32, and 34.)

6. It was established by a preponderance of the evidence that Respondent engaged in unprofessional conduct within the meaning of section 44932, subdivision (a)(1). The established misconduct demonstrates specific instances when Respondent acted unprofessionally, except for the incident involving the classroom suspension of Jesse, which was not proper but was not unprofessional. (Factual Findings 10-13, 16-29, 31-32, and 34.)

7A. It was established by a preponderance of the evidence that Respondent persistently violated or refused to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the Board of the District, within the meaning of section 44932, subdivision (a)(7).

7B. Cases interpreting section 44932, subdivision (a)(7), require a "showing of intentional and continual refusal to cooperate." (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1196.)

7C. In this case, Respondent was intentionally and continually insubordinate to his supervisors, mainly Principal Seary and Assistant Principal Martinez. He refused to follow their directives and District policy, and he mocked or scorned them in front of students and/or colleagues. (Factual Findings 16-27 and 33.) By repeatedly accessing and downloading pornographic material on his District-issued computer in violation of the District's Acceptable Use Policy, Respondent similarly persistently and intentionally violated District policy. (Factual Finding 29.)

8. It was not established by a preponderance of the evidence that Respondent willfully refused to perform regular assignments without reasonable cause, as prescribed by the rules and regulations of the District, within the meaning of section 44939. Though Respondent's conduct in many instances was insubordinate, we do not find that he willfully refused to perform a regular assignment.

9. The District established that it had good cause to immediately suspend Respondent for acts of immorality pursuant to section 44939. The District did not establish that it had good cause to immediately suspend Respondent for refusing to perform a regular assignment pursuant to section 44939. (Legal Conclusion 3, Factual Findings 10-12, 29, 32 and 34.)

Analysis of the Morrison Factors

10. In reaching the above, we also conclude that Respondent's misconduct relates to his fitness to teach, within the meaning of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. The *Morrison* analysis does not apply to cause for dismissal for unsatisfactory performance (*Id.*, at pp. 227-230), and we have not found cause for dismissal for failing to perform a regular assignment. However, with regard to the remaining causes for dismissal, we considered all the factors suggested by *Morrison* and compared them to the facts established above. Not all "*Morrison* factors" need be present for the *Morrison* test to be satisfied. (*Governing Board of ABC School District v. Haar* (1994) 28 Cal.App.4th 369.)

Moreover, the *Morrison* analysis need not be conducted on each individual fact established, but rather can be applied to the accumulated facts established collectively. (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1457.) In this case, we find as follows:

(A) The likelihood the conduct may adversely affect students or fellow teachers. Respondent's misconduct adversely affected students and fellow teachers. Many students felt uncomfortable in Respondent's classroom; some students were emotionally harmed by Respondent's comments. Several teachers were annoyed or felt uncomfortable in faculty meetings due to Respondent's antics. Respondent consumed a great deal of his supervisors' time trying to manage him.

(B) The degree of such adversity. The adversity against fellow teachers was moderate; some were bothered by Respondent's conduct, some were simply annoyed. A few students were seriously affected by Respondent's conduct.

(C) The proximity or remoteness in time of the conduct. The misconduct is more proximate than remote, in that it occurred two to three years ago.

(D) The type of teaching certificate held by the party involved. This factor applies because Respondent has a CLAD Certificate, which emphasizes tolerance and sensitivity to cross-cultural differences. Respondent displayed neither in dealing with his students.

(E) The existence of extenuating or aggravating circumstances, if any, surrounding the conduct. Neither aggravating nor extenuating circumstances were proven.

(F) The praiseworthiness or blameworthiness of the motives resulting in the conduct. This factor has mixed application. Initially, Respondent's motive was to improve education at the District. That was a laudable goal. However, in promoting his agenda, Respondent became involved in a personnel clash with the District and his supervisors, into which he dragged students and colleagues, which negatively affected them. That conduct is blameworthy.

(G) The likelihood of recurrence of the questioned conduct. It is highly likely that Respondent will engage in the same activity if put back in a District classroom.

(H) The extent discipline may cause adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. We do not foresee this happening, for the reasons discussed below regarding Respondent's affirmative defenses.

Respondent's Whistleblowing Affirmative Defense

11A. Respondent contends his termination was in retaliation for his whistleblowing activity, which consisted of his complaint to school authorities about what he viewed as improper social promotion done in violation of District policy (students were graduated who did not have ability to promote based on examination results), and his complaints about what he viewed as economically wasteful actions of the District (including excessive rents, telephone/computer lines, and too many teachers assigned) at the Miracle Mile campus.

11B. Pursuant to section 44114, subdivision (e), a teacher who has been retaliated against for statutorily protected "whistleblowing" may assert that as an affirmative defense in an administrative hearing regarding adverse action by an employing school district.

11C. Section 44114, subdivision (e), places on Respondent the initial burden of proving "by a preponderance of the evidence that an activity protected by this article was a contributing factor in the alleged retaliation."

11D. To constitute an activity protected under section 44114, Respondent must demonstrate that he had a reasonable and good faith belief that an improper governmental activity occurred. A "protected disclosure" is defined by section 44112, subdivision (e), as "a good faith communication that discloses or demonstrates an intention to disclose" an "improper governmental activity," which section 44112, subdivision (c), defines as an "activity [that] violates a state or federal law or regulation," or "is economically wasteful or involves gross misconduct, incompetency, or inefficiency."

11E. If Respondent meets his burden of establishing the elements described above, the burden shifts to the District to demonstrate by clear and convincing evidence that the adverse action would have occurred for legitimate, independent reasons, even if Respondent had not engaged in the protected activity. (§ 44114, subd. (e).) Proof by clear and convincing evidence is greater than preponderance of evidence, but does not require proof beyond a reasonable doubt.

12A. In this case, Respondent failed to meet his initial burden of establishing that he was retaliated against by the District. Respondent had a good faith belief that he was reporting improper governmental activity. It is clear that he reported his concerns to the appropriate recipients for purposes of section 44114. We are not sure his beliefs were reasonable. Even assuming that point for argument sake, Respondent failed to establish by a preponderance of the evidence that the District took any action against him because he was a whistleblower. Respondent's social promotion complaints were utterly lacking in merit; his financial waste complaints were trivial. The District had no motivation or incentive to take action against anyone who lodged such complaints. More importantly, each act of counseling and discipline taken by the District was directly connected to a complaint from a student, parent, or fellow teacher, as well as Respondent's underlying misconduct. Instead of diffusing the situation by following his supervisors' directives and counseling, Respondent ignored them. He became increasingly insubordinate and essentially declared war on his

supervisors, leaving them no choice but to continue with progressive discipline until termination was the last resort.

12B. Respondent's affirmative defense is built upon his foundational argument that he had not been subjected to formal discipline before he began his whistleblowing. That fact is true. But we find that was coincidental. First, it must be remembered that Respondent received informal discipline before the events in question, which stemmed from conduct that was similar, but less severe, than the misconduct proven in this case. Also, Respondent spent much of his time before 2009 at charter schools. We believe Respondent was more comfortable teaching in that environment than at the urban alternate high school setting with students from mixed cultural backgrounds. Once he started at CHS, Respondent initially moved around campuses and did not spend enough time at one particular site to become incendiary. As he spent increasing time at ELAOC, Respondent's problems intensified. Given his temperament and teaching style, Respondent was not a good fit for the students at ELAOC. As complaints began arising from Respondent's culture clash with his students, the glare from his temperamental defects and deficiencies intensified and caused more scrutiny from his supervisors.

12C. Respondent argues the favorable letter Principal Seary wrote for him in 2007 is indicative of her true feelings for Respondent, which were later only tarnished by his whistleblowing. By the time she wrote her letter in 2007, Principal Seary probably believed most of what she wrote. She had only engaged in informal counseling of Respondent by then. She probably would have written the same letter after Respondent began his whistleblowing. She certainly would not have written that letter once Respondent started engaging in his misconduct and declared war against her. Thus, the letter Principal Seary wrote is of no moment.

Respondent's First Amendment Retaliation Defense

13A. Respondent contends that his termination was also in retaliation for exercising his right to communicate with members of the press, a right secured under the First Amendment of the United States Constitution and Article I of the California Constitution. Specifically, Respondent contends his communications with the reporter of the Los Angeles Times concerning social promotion constitutes such activity.

13B. In *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575, the California Supreme Court held that if the reason for a school district's dismissal of a teacher *was not* the cause stated in an accusation but rather *was* official dissatisfaction with the teacher's exercise of constitutional rights, the termination should be set aside, unless it is further determined that the consequent limitation on these rights is justified by a compelling public interest. If it is found that the reason for dismissal *was* the cause stated in the accusation and *was not* official dissatisfaction with the teacher's exercise of constitutional rights, the termination should be upheld. However, if it is found that the reason for dismissal was *both* the cause stated in the accusation *and* official dissatisfaction with the teacher's exercise of constitutional rights, it

should be determined whether, absent the exercise of constitutional rights, the school district would still have dismissed the teacher. (*Id.*, at pp. 592-593.)

13C. In order to establish such an affirmative defense, Respondent must establish that: (1) he spoke on a matter of public concern; (2) he spoke as a private citizen and not a public employee; (3) an adverse employment action was taken against him; and (4) the protected speech was a substantial or motivating factor in the adverse action. (*Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1070-1071.)

13D. Since the party asserting an affirmative defense bears the burden of proof (Evid. Code, § 500), Respondent has the burden of establishing his affirmative defense that the District's decision to fire him was the result of retaliation for his exercising a constitutional right. Here, Respondent agrees he bears this burden, and that he must do so by a preponderance of the evidence.

13E. The parties agree that if Respondent establishes the elements of retaliation for exercising a constitutional right, the burden shifts to the District, which may overcome Respondent's affirmative defense by showing either: (1) that the District's administrative interests outweigh Respondent's constitutional rights; or (2) that the same adverse employment action would have been taken against him even in the absence of the protected speech. (*Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1072.) The District would have the burden of proving the same by a preponderance of the evidence. (*Shimoyama v. Board of Education* (1981) 120 Cal.App.3d 517, 524.)

14A. This issue is complicated somewhat by the fact that in some of Respondent's communications to Mr. Landsberg of the Times, he divulged confidential student information, protected by federal law and by District policies that prohibit disclosure of that information. While Respondent contends some of the actions taken against him by the District were directly related to his communications with Mr. Landsberg, the District contends that it may discipline a teacher for disclosing confidential information that has such protection.

14B. Respondent contends that he was privileged to disclose such information, and is exempt from discipline, due to the protections that reporters enjoy under the law. While reporters do have certain legal protection, such does not extend by extrapolation to those who share information with them. For example, Respondent cites to Article I, section 2, subdivision (a) of the California Constitution, which provides, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." Thus, it is clear that while a member of the press, or a private party, may speak or write as they wish, they are subsequently accountable for abuse of this right.

14C. Respondent also cites to Evidence Code section 1070, also known as the "Newsman Privilege," which simply protects members of the media from being found in contempt for refusing to disclose a source of information, or for refusing to divulge any unpublished information. There is nothing in this statute which affords any protection to the source of the information provided to a media member.

15. In this case, Respondent established that he spoke to a member of the press on a matter of public concern, that he did so as a private citizen, and that an adverse employment action was taken against him. However, Respondent failed to establish by a preponderance of the evidence that he was retaliated against for exercising a constitutional right, i.e., that his protected speech was a substantial or motivating factor in the District's decision to terminate and/or immediately suspend him. We reach this conclusion for the same reasons we reject Respondent's whistleblower affirmative defense. Although the District based its discipline, in part, on Respondent sharing confidential student information with Mr. Landsberg, the District was entitled to do so because Respondent violated District policy, federal law, and prior supervisor directives to not do so. None of the law cited by Respondent gave him liberty to share that information with the public, nor did it immunize him from the repercussions of doing so. The District would have taken the same personnel actions against Respondent had he never communicated with Mr. Landsberg.

Disposition

16A. "The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction." (*California Teachers Association v. State of California* (1999) 20 Cal.4th 327, 343-344.) Thus, even where cause for dismissal has been established, the Commission still has broad discretion to determine whether such discipline is actually warranted. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208, 222.)

16B. In this case, the District established that Respondent engaged in serious misconduct, which provides numerous legal grounds to discipline him. Progressive discipline was used, but was not successful. Respondent failed to prove his affirmative defenses, and he has presented no mitigation, rehabilitation or a scintilla of remorse for his actions. Under these circumstances, similar misconduct would be likely should Respondent be placed back in a District classroom. Termination is therefore warranted. We agree unanimously. (Factual Findings 1-47, Legal Conclusions 1-15.)

///

///

///

///

ORDER

The immediate suspension without pay of Respondent Leonard Isenberg is affirmed. Leonard Isenberg is dismissed from employment with the Los Angeles Unified School District.

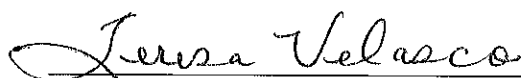
DATED: October 15, 2013

A handwritten signature in black ink, appearing to read 'Eric Sawyer', is written over a horizontal line.

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings

I concur.

DATED: 10/22/13



Teresa Velasco, Commissioner

I concur.

DATED: 10/18/2013

Teresa Brown
Teresa Brown, Commissioner